STIPULATED SINGLE APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

VS.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari Filed February 14, 1974
Certiorari Granted April 15, 1974

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DOCKET ENTRIES

Date	Filings—Proceedings
1966	
June 30	1—Filed complaint issued summons (jury demanded)
July 7	2—Filed summons on return.
July 25	3—Filed answer of defendants.
1969	
June 3	—Pretrial conf. had & concl. Ord P/T ord lodged by 8/18/69 & con to 9/17/69, for Court Trial on all issue excepting damages. (Carter)
Sept. 12	69—Filed PRE-TRIAL ORDER; trial set for Sept. 17, 69, 10 AM. (Carter)
Oct. 7	73—Filed order denying deft's. mo. for summary judgment. (Levin)
Oct. 15	—Ordered case set for ct tr on April 6, 1970 (Zirpoli)
April 16	—Ord. ct tr resumed, after arguments by respective counsel the ct made a finding that the pltiff Eugene Kelley was covered by the Federal Employee's Act. Findings to be presented by counsel for Pltiff. Case conted to 1:30 p.m. May 6, 1970 to set for jry tr. (Zirpoli)

June 29	84—Filed Findings of Fact & Conclusion of Law ((1) At the time & place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of Southern Pacific Co. which brought Pltiff within the traditional agency relationship to Southern Pacific Co. & in such relationship to Southern Pacific Co. as to be covered by the Federal Employers' Liability Act. (2) This court has jurisdiction under the Federal Employers' Liability Act, 45 USC Sec. 51 et seq.) (Zirpoli)
1970	
Apr. 15	96—Entered Judgment in favor of pltf Eugene C. Kelley in amt. of $200,000.00. Filed 4/15/71
Apr. 16	—Mailed Clerk's notice of entry of judgment.
May 12	99—Filed deft's notice of Appeal. (Zirpoli)

Clerk's Transcript

[Filed Dec. 28, 1967]

[108] 14. Continued

Name	Employer	Director or Officer SP Co. and P M T CO.	Sou. Pac. Dir. Ofr.	P M T Co. Dir. Ofr.	
P. J. Kendall	SP CO	1945-1959	X	X	X
G. C. Baker	SP CO	1944-1947	X	X	
H. W. Klein	SP CO	1943-1955	X	X	
C. H. Grant	SP CO	1947-1958	X	X	
J. A. Quinn	SP CO	1949-1957	X		X
A. V. Casey	SP CO	1960-1961	X		X
B. F. Biaggini	SP CO	1958-1964	X	X	X
U. E. Nordeen	SP CO	1959-1961	X	X	X
H. J. Walker	SP CO	1951-1966	X	X	
T. F. Ryan	SP CO	1952-date	X		X
R. E. Plummer	SP CO	1958-1960	X		X
H. A. Nelson	SP CO	1961-1965	X	X	
J. B. Reid	SP CO	1961-date	X		X
D. K. McNear	SP CO	1964-date	X	X	X
A. C. Furth	SP CO	1963-date	X		X
L. E. Hoyt	SP CO	1966-date	X	X	

Address of all of above officers:
65 Market Street, San Francisco, California 94105

Interrogatory No. 15

15. Does defendant, Southern Pacific Company, pay any taxes incurred by Pacific Motor Trucking Company? If your answer is in the affirmative, please set forth for each year since the date of incorporation of Pacific Motor Trucking Company what percentage of taxes incurred by Pacific Motor Trucking Company were paid by defendant, Southern Pacific Company.

Answer

15. Southern Pacific Company does not pay any taxes incurred by Pacific Motor Trucking Company.

[111] *Interrogatory No. 20*

20. Are any monies, proceeds or financial assistance of defendant, Southern Pacific Company, used

for the purpose of financing the operation of Pacific Motor Trucking Company? If your answer is in the affirmative, what percentage of Pacific Motor Trucking Company's operational costs are derived from Southern Pacific Company monies, proceeds or financial assistance?

Answer

20. From time to time Southern Pacific Company has furnished funds to Pacific Motor Trucking Company for operational purposes. As of August 31, 1967, no such funds were being furnished, therefore percentage of Pacific Motor Trucking Company's operational costs derived from Southern Pacific Company's monies was -0-%.

Interrogatory No. 21

21. Since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of the total capital stock of Pacific Motor Trucking Company which was owned by defendant, Southern Pacific Company, for each year from the date of incorporation of Pacific Motor Trucking Company up to January 1, 1966.

Answer

21. 100%, directly or indirectly.

Interrogatory No. 22

22. What was the dollar value of the capital stock

[116] *Interrogatory No. 33*

33. Set forth the name, and address of all railroad companies which Pacific Motor Trucking Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, during the period between June 1, 1963, and August 1, 1963.

Answer

33. Southern Pacific Company.

Interrogatory No. 34

34. Set forth the name and address of all companies which defendant, Southern Pacific Company, had contracts with **[117]** regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California between the dates of June 1, 1963, and August 1, 1963.

Answer

34. Pacific Motor Trucking Company.

Interrogatory No. 35

35. On the date this accident occurred, was there in effect a policy of insurance by or through which Pacific Motor Trucking Company was insured in any manner or to any extent, whether primary or excess, with respect to any claim, cause of action, injuries or damages alleged or claimed against Pacific Motor Trucking Company? If so, state:

a) The number of said policy or policies of insurance.

b) The name of the company or companies issuing said policies.

c) The name or names of the insureds.

d) The limits of liability of each policy.

Answer

35. Yes.

a) SF-29577
SPF-842

b) Lloyd's and English Companies
Transportation Mutual Insurance Company

c) Southern Pacific Company and/or subsidiary companies.

d) 60% of 100% of $5,000,000 any one loss in excess of $500,000 each and every loss.

40% of 100% of $5,000,000 any one loss in excess of $500,000 each and every loss.

[127] R. Jay Engel, Esq.
Jarvis, Miller & Stender
123 Second Street
San Francisco, California 94105
Telephone: 982-9617
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed Jan. 10, 1968]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT

To: Defendant above named, and to Corrigan & Roy, its attorneys:

Pursuant to the provisions of California Code of Civil Procedure, Section 2030, you are requested to answer in writing and under oath the following interrogatories within 15 days from the time service is made upon you. Please note that in answering these interrogatories you should furnish all information

possessed by or available to the defendant, its representatives, investigators and attorneys.

1. In the deposition of Mr. Roy A. Hedlund on September 6, 1967, Mr. Hedlund stated that the rate charged by Southern Pacific Company in certain instances include the charge involved of setting the automobiles off of a tri-level auto carrier onto the abutting ground. Mr. Hedlund further stated that whether these charges are included or not depends on the point of origin and the point of destination. With regard to Mr. Hedlund's testimony, please set forth the following:

(a) What points of origin and what points of destination give rise to a charge made by defendant, Southern Pacific Company, for the removing of automobiles from tri-level auto carriers as of July 5, 1963?

[147] Corrigan and Roy
Attorney at Law
65 Market Street, Room 834
San Francisco, California 94105
Telephone: 362-1212
Extension: 22513
Attorneys for Defendant

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed Sept. 17, 1968]

ANSWERS TO INTERROGATORIES

Comes Now defendant, Southern Pacific Company, a corporation, and answers those interrogatories heretofore proposed and propounded by plaintiff. The following answers have been prepared by Donald O. Roy, attorney and agent for said defendant and are based upon his information and belief from information available to said defendant at this time. The

information supplied in these answers has been obtained from the files of said Donald O. Roy.

1) Contrary to Mr. Hedlund's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles without regard to the origin of the particular shipment.

2) Yes.

[230] Workmen's Compensation Appeals Board

State of California

Case No. 65 SF 211-771

Eugene C. Kelley,
Applicant,

vs

Pacific Motor Trucking Company,
Defendant.

[Filed Feb. 9, 1966]

FINDINGS AND AWARD

Upon hearing before Edward C. Neely, Referee, and submission, said Referee now makes his decision as follows:

FINDINGS OF FACT

1. Eugene C. Kelley, born March 22, 1936, while employed as a freight handler at San Francisco, California, on July 3, 1963, by Pacific Motor Trucking Company, sustained injury arising out of and in the course of his employment. On said date, Pacific Motor Trucking Company was the employer's carrier for workmen's compensation insurance and the employee's wages were maximum.

2. Said injury caused temporary disability commencing July 4, 1963, continuing to and including August 10, 1965, for which applicant has been adequately compensated at the rate of $70 per week.

Defendants are entitled to credit for all payments made.

3. The injury herein also caused permanent disability of 100%.

4. No basis for apportionment exists herein.

5. Applicant is in need of further medical treatment, including the repair and replacement of appliances.

6. Applicant is entitled to reimbursement for self-procured medical treatment obtained from Fresno County Hospital, if said bill has not already been paid.

[231] 7. Applicant is entitled to reimbursement for medico-legal expense in the amount of $165 for the examination, x-rays and report of Dr Weitz.

8. Applicant's attorney has rendered services of the reasonable value of $750 and is entitled to a lien therefor.

A W A R D

Award Is Made in favor of Eugene C. Kelley against Pacific Motor Trucking Company of

(a) permanent disability indemnity payable at the rate of $52.50 a week commencing August 18, 1965, and continuing for 400 weeks until the total sum of $21,000 shall have been paid, and thereafter a life pension at the rate of $48.46 per week, less credit to defendant for payments heretofore made, less an attorney's fee of $750 to John H. Lenz, Esq.;

(b) such further medical treatment as may reasonably be required to cure or relieve of the effects

of the injury herein, including repair and replacement of appliances; NOTE: Defendants should be given the opportunity to furnish same;

(c) reimbursement for self-procured medical treatment obtained from Fresno County Hospital, if said bill has not been paid;

(d) reimbursement for litigation expense in the amount of $165 payable to Ernest M. Weitz, M.D.

/s/ Edward C. Neely, Referee
Edward C. Neely, Referee
Workmen's Compensation Appeals Board

Filed and served on all parties as shown on Official Address Record on Feb. 9, 1966.

[179] NOTICE OF MOTION
and
MOTION FOR SUMMARY JUDGMENT

To Plaintiff Eugene C. Kelley and to his attorneys Messrs. Jarvis, Miller and Stender:

Please Take Notice that on Monday, August 11, at the hour of 10:00 A.M., or as soon thereafter as counsel may be heard, in the courtroom of the Law and Motion Department of the above-entitled court, Defendant, Southern Pacific Company, will move the court for summary judgment against Plaintiff and in favor of Defendant Southern Pacific Company. The ground of the motion will be the lack of jurisdiction of this court. The motion will be made and based upon this motion, all pleadings, records and files herein, including interrogatories and depositions on

file herein, upon the attached Affidavit of R K. Booth, upon the attached Statement of Reasons and Authorities, and upon such further materials, oral and documentary, as the court may receive at the time of said hearing.

/s/ John J. Corrigan
John J. Corrigan
65 Market Street
San Francisco
DO 2-1212

[224] AFFIDAVIT OF R. K. BOOTH

I am Vice President and Controller of Pacific Motor Trucking Company. I am senior vice president of the company and have jurisdiction over commerce, accounting and other matters. I am a member of the Board of Directors of Pacific Motor Trucking and have been continuously involved in admistrative matters for the company since 1935. I make the following statements from my own personal knowledge, and I have inspected the appropriate company business records to aid in making this statement.

Pacific Motor Trucking Company is a corporation of the State of California incorporated in 1933. It has authorized 350,000 shares of $50.00 par value stock, and has outstanding 227,500 shares, all held now and in 1963 by Southern Pacific Company. Its present directors are B. R. Johnson, L. E. Hoyt, D. K. McNear and myself, none of whom is a director of Southern Pacific Company Its principal officers are B. R. Johnson, President, myself, Vice President and Controller, T. T. Edwards, Vice President and General Manager, and S. F. Jordan, Vice President-Sales, none of whom is an officer or director of Southern Pacific Company. The stockholders' annual meeting is held in San Francisco the first Monday in April; this year's meeting was held April 7, 1969. Directors' meetings are held as needed at such time and place as the Board may fix; in 1963 there were 8 meetings; in 1964, 14 meetings; in 1965, 8 meetings; in 1966, 8 meetings; in 1967, 8 meetings; in 1968, 15 meetings, and thus far this year, 6 meetings. Full and complete minutes are kept of each stockholders' and directors' meeting.

Pacific Motor Trucking Company operates as an interstate and intrastate motor common carrier over regular and irregular routes totaling over 15,000 highway route miles in the states **[225]** of Oregon, California, Nevada, Arizona, and New Mexico, to and from Vancouver, Washington, and to and from points in El Paso County, Texas. It is a member of the Regular Common Carrier Conference of the American Trucking Association and the California Trucking Association. Pacific Motor Trucking is authorized to and performs a direct service to the public. For many years a substantial portion of the gross income of Pacific Motor Trucking has come from its services rendered directly for the public, and for every year since 1956, 50 percent or more has come from such sources. In 1968 Pacific Motor Trucking carried 7,533,894 tons of freight and operated in excess of 52,563,933 million power unit miles. In addition to

its common carrier functions, Pacific Motor Trucking Company operates various unloading and local delivery services under contract for freight forwarders and railroads, including railroads not affiliated with or controlled by Southern Pacific Company. Southern Pacific Company employs firms other than PMT to perform unloading services, even at locations which PMT serves. In addition, PMT subcontracts to trucking companies such as Commercial Carriers, Insured Transporters, Robertson Truckaway and others contracts to unload multi-level cars at certain locations. PMT handles containerized traffic for steamship companies, and transports new automobiles to California and Nevada points. As such, it is one of the largest auto transporters in the country. Pacific Motor Trucking neither owns nor controls any railroad track, rolling stock or motive power, and conducts no railroad operations. Southern Pacific Company neither owns nor operates any trucks or vehicles in motor common carrier service, nor does it hold any certificates for motor common carrier operation. Pacific Motor Trucking Company holds certificates of public convenience **[226]** for its common carrier services.

Pacific Motor Trucking Company maintains general offices at 9 Main Street, San Francisco, which is completely separate and apart from the general offices of Southern Pacific. All the principal officers of Pacific Motor Trucking are situated at 9 Main Street, and no Southern Pacific Company officers have offices with PMT. PMT maintains at this location executive, operating, traffic, sales, accounting, personnel

and other departments. These departments and officers are completely separate and apart from Southern Pacific Company and form no part of any corresponding Southern Pacific Company departments. The officers and employees of Pacific Motor Trucking Company report directly to their superiors within the company and ultimately to the President of PMT, and they neither report to nor are subject to the supervision of Southern Pacific Company personnel. Certain functions such as claims investigation and legal representation are handled by Southern Pacific Company for Pacific Motor Trucking Company, but when this is done Pacific Motor Trucking Company pays for the services rendered. As noted, such services do not extend to executive, operating traffic, sales, accounting, or personnel functions—all of which are handled by PMT for itself.

Pacific Motor Trucking Company is subject to Part II of the Interstate Commerce Act. PMT submits to the ICC the Motor Carriers Annual Report, the Annual Report of Freight Commodity Statistics, and the Quarterly Report of Revenue, Expenses and Statistics for Class I Motor Carriers of General Freight. These reports are signed and submitted by Pacific Motor Trucking Company officers.

As of December 31, 1968, Pacific Motor Trucking Company had assets of $37,139,829, and liabilities of $9,485,844. **[227]** Cash and other current assets amount to $9,754,846; accounts payable are $3,092,991. Total investment in carrier operating property as of December 31, 1968, was $46,456,781; accrued deprecia-

tion amounted to $25,192,091, leaving a net investment of $21,264,690. Operating results in 1968 showed the following: revenue $59,901,699; expenses (including taxes) $58,375,152; income $1,526,547. PMT Company accrues its own revenues and pays its own expenses and no part of such expenses is paid by Southern Pacific Company. All accounts and accounting of Pacific Motor Trucking Company are separate and distinct from any accounts of Southern Pacific Company. PMT keeps accounts in accordance with regulations issued by the Interstate Commerce Commission for Motor Common Carriers, and this system is completely different from the Uniform System of Accounts for Railroad Companies, which Southern Pacific Company follows. There has never been a dividend declared on the PMT stock and no part of PMT's assets, whether surplus or otherwise, has ever been transferred to Southern Pacific Company by any means, nor are there any plans or proposals for doing so.

In order to maintain its self-insurance status for Workmen's Compensation liabilities in the State of California, Pacific Motor Trucking Company maintains on file with the Department of Industrial Relations of the State of California a bond equal to one hundred twenty-five percent of its outstanding liabilities. The amount of this bond is reviewed and readjusted annually by the State of California. In addition, PMT Company maintains a reserve account for its Workmen's Compensation liability, including liability to Mr. Eugene C. Kelley.

Pacific Motor Trucking Company has approximately 4,000 employees, including approximately 2,000 drivers. **[228]** It owns approximately 6,000 pieces of trucking equipment. It publishes tariffs, issues bills of lading, and conducts its common carrier and other services for the public entirely with its own personnel, equipment and terminals. Drivers, dock and mechanical personnel are members of the Teamsters and Machinists unions and not members of any railroad brotherhood or union. Labor collective bargaining agreements are negotiated by PMT Company officers with all its union affiliations. All PMT employers are paid by vouchers drawn on PMT Company and out of PMT accounts. No PMT employee is carried on Southern Pacific Company payrolls.

Eugene C. Kelley, the plaintiff in this suit, was employed by Pacific Motor Trucking Company as a platform man on June 16, 1955, and worked for it continuously to and including his accident in July 1963, except for a brief period in September and October 1960, when he was on leave of absence. Pacific Motor Trucking Company paid his wages and supervised and directed his work continuously during this period. Pacific Motor Trucking Company had the right to discharge him from its employ subject to the provisions of his collective bargaining agreement. Pacific Motor Trucking Company has paid workmen's compensation benefits and furnished medical care to Mr. Kelley continuously since the date of his accident, pursuant to the workmen's compensation

laws of the State of California and an award made to him by the Industrial Accident Commission (now Workmen's Compensation Appeals Board). True copies of Mr. Kelley's application for benefits and of the award are attached hereto. As of the present time over $7,000 of medical care, drugs, etc., has been furnished, and Mr. Kelley has been paid over $20,000 in compensation benefits.

[229] State of California,
City and County of San Francisco. — ss.

I have read the foregoing affidavit and the statements in it are true of my own knowledge, except as to matters stated on information and belief, and as to those matters I believe them to be true. I am authorized to make this affidavit on behalf of Pacific Motor Trucking Company.

Executed at San Francisco July 1, 1969.

/s/ R. K. Booth
R. K. Booth

Subscribed and sworn to before me this 1st day of July, 1969.

(Seal) /s/ John E. Jurgens
John E. Jurgens
Notary Public-California
Principal Place of Business in
City and County of San Francisco.
My Commission Expires June 13, 1973.

[233] State of California
Industrial Accident Commission

APPLICATION

[Filed October 2, 1965]

Case No. 65 S.F. 211-771

File Signed Original and Six Copies
(Please Print or Type Names and Addresses)

Eugene C. Kelley, (Social Security No. 567-42-3742), 1253 Victor Avenue, San Leandro, California.

Pacific Motor Trucking Company, 9 Main Street, San Francisco, California.

Southern Pacific Company, 65 Market Street, San Francisco, California.

1. It is alleged that Eugene C. Kelley, 3/22/36 (Date of Birth), while employed on July 3, 1963 as a freight handler at San Francisco, California, by Pacific Motor Trucking Company sustained injury arising out of and occurring in the course

of employment. (State what parts of body were injured and subsequently results)—back-left arm. (Explain what employee was doing at time of injury and how injury was received) Untieing cars on loading dock—hand hold let go; fell 15 feet, landed on back, left arm.

2. Actual earnings at time of injury $168. per week. The basis of pay was: $3.25 hr.

3.

4. Was compensation paid? Yes. $70.00 (weekly rate). Have you received unemployment or unemployment compensation disability benefits since the date of injury?

5. Was medical treatment received? Yes. State date last received:

   Was all treatment provided by the employer or insurance company? Yes. If not, state who provided it.

   Also state names and addresses of all doctors who treated or examined for this injury. S. P. Hospital; Dr. Williams; Dr. Phipps.

6. This application is filed because of disagreement regarding liability for:
   Temporary disability ____ Permanent disability _X_ Proper Compensation Rate ____ Self-procured medical costs _X_ Litigation costs _X_ Medical treatment _X_ Other ____ Specify:

7. Have you ever had a case for another injury before the California Commission?

WHEREFORE, applicant requests a hearing and awards for all appropriate benefits provided by law.

Dated at San Francisco, California, 10/21/65

Hearing requested at San Francisco.
Please set _X_; set later on written request ____.
Estimated time of trial

/s/ Eugene C. Kelley
/s/ John H. Lenz

123 Second St., S. F. YUkon 2-9617

10-26-65—Served all parties.

AK

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[250] In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed September 8, 1969]

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

This action arises out of an accident that occurred July 3, 1963, at Channel and Third Streets in the City and County of San Francisco, State of California. The action arises under the Federal Employers Liability Act 45 U.S.C. 51, et seq.

The defendant Southern Pacific Company has filed a Motion for Summary Judgment based on their contention that the plaintiff Eugene Kelley at the time of the accident in question was not an employee covered by the Federal Employers Liability Act. This Memorandum is filed in opposition to that Motion.

The defendants in their Motion misstate the issue that is now before this court. The issue is: "Was the injured plaintiff Eugene Kelley an employee of an agent or adjunct of the defendant railroad company, Southern Pacific Company, and consequently treated as an employee of the railroad for purposes of the Federal Employers Liability Act."

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[261] V

CONCLUSION

It is submitted that the above authorities clearly substantiate the proposition that Federal Employers Liability Act is extended to employees of agents of defendant Southern Pacific Company. Defendant

Southern Pacific Company concedes that the plaintiff Eugene Kelley was an employee of Pacific Motor Trucking Company. It is submitted that the above authorities further stand for the proposition that the question of whether Pacific Motor Trucking Company is an "agent" of defendant Southern Pacific Company is a question of fact. It is submitted that the above interrogatories and depositions not only present a question of fact with regard to whether Pacific Motor Trucking Company is an "agent" of defendant Southern Pacific but also substantiate the conclusion that PMT is such an "agent" and that consequently the plaintiff Eugene Kelley is entitled to coverage under the Federal Employers Liability Act. It is submitted this court has jurisdiction of the above action and defendant's motion for summary judgment should be denied.

Dated:_____ and signed by me.

/s/ R. Jay Engel
R. Jay Engel

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[265] V

CONTESTED ISSUES OF FACT

The contested issues of fact are:

(1) Whether in fact plaintiff Kelley had an employment relationship with defendant sufficient to invoke the FELA.

(2) Whether in fact Pacific Motor Trucking Company was the alter ego of Southern Pacific Company.

[281] R. Jay Engel
Attorney at Law
Columbus Towers
916 Kearny Street
San Francisco, California 94113
(415) Exbrook 2-5520
Attorney for Plaintiff

In the United States District Court
for the Northern District
of California
No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed October 7, 1969]

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the Honorable Gerald S. Levin. R. Jay Engel, Esquire, 916 Kearny Street, Suite 201, San Francisco, California 94133 appeared on behalf of the plaintiff; John Corrigan and Donald Roy appeared on behalf of the defendant.

Good Cause Appearing Therefore, it is hereby ordered and decreed that defendant's motion for Summary Judgment is denied.

Dated: October 7, 1969.

/s/ Gerald S. Levin
Judge Gerald S. Levin

[292] In the United State District Court
For the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed April 6, 1970]

TRIAL MEMORANDUM

I

Introduction

This action arises out of an accident that occurred July 3, 1963, at Channel and Third Streets in the City and County of San Francisco, State of California. The action arises under the Federal Employers Liability Act, 45 U.S.C. 51, et seq.

The defendant, Southern Pacific Company, filed a Motion for Summary Judgment based on their contention that the plaintiff, Eugene Kelley, at the time of the accident in question, was not an employee covered by the Federal Employers Liability Act. This motion was denied.

Pursuant to the Pre-Trial Order, the trial of this matter has been bifurcated. The only issue now before this Court is:

1. Whether in fact plaintiff Kelley had an employment relationship with defendant sufficient to invoke the [293] FELA.

The proper criteria for determining whether or not the plaintiff is entitled to FELA coverage are: 1. Was the injured plaintiff, Eugene Kelley, an employee of an agent or adjunct of the defendant railroad company, Southern Pacific Company, and consequently treated as an employee of the railroad for purposes of the Federal Employer's Liability Act; and/or 2. Was the plaintiff Kelley performing acts within the "operational activity" of the defendant railroad company thus entitling him to coverage under the Federal Employer's Liability Act.

For purposes of this trial under the Federal Employer's Liability Act plaintiff withdraws the issue as to whether Pacific Motor Trucking Company was the alter-ego of the defendant, Southern Pacific Company, as set forth in the Pre-Trial Order.

[310] In the United States District Court
For the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

CLOSING BRIEF

[315] There is no attempt going to be made on the part of the plaintiff to argue that all employees of Pacific Motor **[316]** Trucking Company come within that "sufficient" relationship as to Southern Pacific Company. Rather, only as to those employees who are in fact unloading tri-level auto carriers at this location.

In the United States District Court
for the Northern District of California

Eugene C. Kelley,
Plaintiff,

vs.

Southern Pacific Company,
a corporation,
Defendant.

[Filed—Jun 29 1970]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

From the record and the evidence the court finds:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

III. Plaintiff had been employed at this particular job (unloading of automobiles for the Southern Pacific Company) and location on a full time basis for a period of eight years and he was paid for his services on an hourly basis.

IV. The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it or through its agents in the regular course of its business pursuant to its contractual responsibilities to the shippers and its tariff responsibilities.

V. At all times relevant to the unloading of the automobiles Pacific Motor Trucking Company in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.

VI. The record is not clear as to who supplied the hammers and ratchet wrenches used by the plaintiff in his unloading operations. The record is clear and the court finds Southern Pacific Company supplied the necessary ramps and working area required to perform the unskilled work being performed by plaintiff at the time of the injury in question.

VII. Southern Pacific Company employees had the responsibility to and were required to daily check the safety of the tri-level cars and the safety railing thereof and to make all necessary repairs.

VIII. The responsibility for immediate supervision and control of the unloading operations here in question was that of Southern Pacific Company, even though the exercise thereof was executed by employees of Pacific Motor Trucking Company, who in such

work were acting as agents of Southern Pacific Company.

IX. The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

CONCLUSIONS OF LAW

I. At the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

II. This court has jurisdiction under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.*

Dated: June 29, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

*In making the above findings of fact and conclusions of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad*, 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company*, 407 F.2d 501 (1969); Restatement, Agency 2d, Section 220.

[387] In the United States District Court
for the Northern District of California

No. 45344-AJZ

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

JUDGMENT

This matter having come before the Court on Friday, April 2, 1971 for further proceedings both parties stipulated to waive of jury as to any further proceedings. The Court having heard all the proceedings prior hereto and having signed its Findings of Fact and Conclusions of Law on June 29, 1970 and upon further stipulation entered in open Court between the parties on April 2, 1971, the Court enters the following judgment and final order:

Judgment is Entered in favor of the plaintiff, Eugene C. Kelley, and against defendant, Southern Pacific Company, and damages are awarded and assessed in the amount of $200,000.00. Plaintiff to submit his cost bill to the clerk.

Dated: April 15, 1971.

/s/ Alfonso J. Zirpoli
Alphonso J. Zirpoli

Approved as to Form:
/s/ John J. Corrigan
John J. Corrigan
Attorney for defendant
Dated: April 12, 1971

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Appellee,

vs.

Southern Pacific Company, a corporation,
Appellant.

[September 7, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: HASTIE,* BROWNING and WRIGHT,
Circuit Judges.

HASTIE, Circuit Judge.

This is an appeal by Southern Pacific Co., a railroad, from a money judgment recovered by Eugene Kelley, a workman, in an action for negligent injury under the Federal Employers' Liability Act, 45 U.S.C. §1.

The only matter in dispute is whether the relationship between Kelley and Southern Pacific was such

*The Honorable William H. Hastie, Senior United States Circuit Judge of the Third Circuit, sitting by designation.

as to bring the tort in suit within the coverage of the F.E.L.A. By agreement of the parties, the issues, factual as well as legal, upon which liability depended were tried to the district court without a jury. After an evidentiary hearing the court entered findings of fact and conclusions of law and imposed liability on the railroad.

The controlling language of the F.E.L.A. makes a "common carrier by railroad . . . liable in damages to any person suffering injury [as a result of the railroad's negligence] while he is employed by such carrier . . . ." The disputed question here is whether Kelley was "employed by" Southern Pacific within the meaning of the statute.

Kelley was seriously injured while he was engaged in unloading automobiles from a Southern Pacific trilevel flat car after the arrival of the shipment at its San Francisco destination. In the language of the district court's finding of fact, amply supported by the evidence: "Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company".[1] That company is a motor common carrier that operates over 15,000 route miles in the western states. Although all of its stock is owned by Southern Pacific, the Trucking Company functions as a distinct entity. Neither in the district

[1]As a result of the accident Kelley had applied for and was awarded as a Trucking Company employee, full workmen's compensation benefits for total disability.

court nor on this appeal has a case been made for piercing the corporate veil and disregarding the separate legal and functional identity of the Trucking Company. *Cf. Fawcett v. Missouri Pac. R.R.*, W.D. La. 1965, 242 F.Supp. 675, *aff'd. per curiam* 5th Cir. 1965, 347 F.2d 233, *cert. denied* 382 U.S. 907.

The relevant Southern Pacific tariff enabled a shipper of new automobiles by rail to take delivery either before or after the "grounding" of the automobiles. In this case the shipper had elected to have the automobiles grounded before delivery and had paid Southern Pacific a standard added charge for this unloading service.

The Trucking Company contracted with Southern Pacific to perform for specified unit prices such unloading of automobiles from railway cars as the railroad should require. Thus, in the unloading operation, Kelley was both performing his normal work for and assigned to him by his regular employer, the Trucking Company, and at the same time enabling the railroad to discharge its contractual responsibility to the shipper. Appropriately, Kelley was a member of the Teamsters union and not of one of the railroad craft unions.

As stated above, the district court explicitly found that Kelley was an employee of the Trucking Company. Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific. Thus, the court did not find or proceed on the basis that Kelley was either a borrowed servant, temporarily in the employment

of Southern Pacific, or that he was a servant in the employ of both companies. Rather, the court adopted a special concept of "employment" for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. *Smith v. Norfolk & W. Ry.*, 4th Cir. 1969, 407 F.2d 501.

The district court reasoned, adopting the Fourth Circuit analysis, that, under its contract with the shipper, the railroad was legally obligated to have the automobiles unloaded from its cars and that in performing that work the "employees of Pacific Motor Trucking Company . . . were acting as agents of Southern Pacific Company." This led to the court's conclusion of law that "[a]t the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty on the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act". Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the "agency relation" which resulted from Southern Pacific's contracting with Kelley's employer to perform Southern Pacific's "non-delegable" contractual duty to its shipper sufficed to bring Kelley's status vis-à-vis the railroad within the F.E.L.A.

Our difficulty with this analysis begins with what the Supreme Court said in the leading case of *Baker v. Texas & Pac. Ry.*, 1959, 359 U.S. 227, 228:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act."

Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice.

We are reinforced in this view by consideration that, apart from the *Smith* case in the Fourth Circuit, considered decisions in this circuit and elsewhere have rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto*. *Dougall v. Spokane, P. & S. Ry.*, 9th Cir., 1953, 207 F.2d 843 (right of way maintenance work); *Norman v. Spokane, P. & S. Ry.*, D.Ore. 1950, 101 F.Supp. 350, *aff'd. per curiam* "for the reasons given in the district court's opinion", 9th Cir. 1951, 192 F.2d 1020 (railroad bridge repair); *Tarboro v. Reading Co.*, 3d Cir. 1968, 396 F.2d 941 (unloading coal cars); *Turpin v. Chicago, B. & O. Ry.*, Mo. 1966, 403 S.W.2d 233, *cert. denied*, 384 U.S. 1003 (unloading flat cars).

It also merits mention that years ago Congress considered and rejected a proposal to include companies that provide railroad accessorial services under the

F.E.L.A. In 1939, Congress amended the F.E.L.A., 53 *Stat.* 1404, and in the process considered various proposals. One proposal would have extended coverage to suppliers of accessorial services and their employees. Its rejection, after extensive committee hearings, was announced by the Senate Judiciary Committee in reporting the bill that ultimately passed.

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." S.Rep. No. 661, 76th Cong., 1st Sess.

The result which Congress deemed undesirable and, therefore, refused to legislate directly, should not, in our view, be achieved judicially by treating employees of contractors rendering accessorial services as if they were employees of the railroad when common law analysis has failed to yield that conclusion.

The judgment is reversed.

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 71-2262 Eugene C. Kelley
vs
Southern Pacific Company

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered SEP 7 1973 REVERSED the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Appellee,
vs.
Southern Pacific Company,
a corporation,
Appellant.

[Filed Nov. 21, 1973]

ORDER

Before: HASTIE,* BROWNING, and WRIGHT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

Dated: November 21, 1973

*Honorable William H. Hastie, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Reporter's Transcript

[4] The Court: May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pickup and delivery and your operational theory is correct, why do you need any of this evidence of control?

Mr. Engel: Well, Your Honor, what our purpose in putting the evidence on is to actually anticipate any argument that the defense may have with regard to the Smith case. In other words, we intend to show, and I think the interrogatories in fact, and the depositions, show as much factual basis for decision as existed in the Smith case.

The Court: Well, they would be justified in the sense [5] of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions.

[17] Mr. Engel: But he is talking in terms of——

The Court: Well, he is talking in terms of, his theory is that the Act speaks of employees of a railroad, these people are not employees of the railroad, and no matter what other theory you want to invoke, Congress never extended [18] it beyond actual employees of the railroad.

[Mr. Corrigan, counsel for defendant]

[19] The Court: Isn't that what he is saying, though? Isn't he saying that you can't delegate the

responsibility of unloading the cars to someone else?

Mr. Corrigan: But you see——

The Court: Go ahead.

[32] Q. Now, when you say to untie, what is untying, what do you do?

A. Well, it's a rachet on there and you have to break the rachet loose so you can get the slack off the chain.

Q. Now, we are talking about automobiles that are loaded on one of these tri-level cars, and they come into this yard, is that correct?

A. Right.

Q. And these automobiles—are they attached some way to the tri-level?

A. Just by chains.

[33] Q. All right, and the chain, is it attached to the tri-level?

A. To a rachet.

Q. All right. It's connected to the actual train car, is that correct?

A. Yes, it is.

Q. And this chain is then hooked to the automobile?

A. Not the chain itself; there's another hook attached to the chain.

Q. All right. Now, the untying process, what does it do in relationship to that?

A. It loosens the chain.

Q. All right. Does it actually come unattached or unhooked from the automobile?

A. No.

Q. And then you say then two people, the other two people do what?

A. Take the hooks off the car.

Q. Now, after that process is done, then what's the next procedure?

A. Drive them off.

[52] Q. Now, do you know a gentleman by the name of Mr. Holland?

A. Yes, I do.

[53] Q. And did you have occasion to see him down at this piggyback area?

A. Every day.

Q. And did he ever have occasion to tell you to do anything?

A. Not tell me; asked me.

Q. All right, and what did he ask you to do?

A. The same as Mr. Hedland, lift the plate, lower the plate.

Q. How about the safety rails that we have referred to? Would he have occasion to ask you to lower or raise those?

A. Just lower them.

Q. All right. Mr. Morse—do you know him?

A. Yes.

Q. Who was he?

A. He is an S.P. clerk on the night shift.

The Court: What's his name?

Mr. Engel: Mr. Morse, M-o-r-s-e.

Q. Who was Mr. Holland's employer?

A. Southern Pacific.

Q. And who was Mr. Morse's employer?

A. Southern Pacific.

Q. And what job does Mr. Morse have there?

A. Same as Mr. Holland, except at night.

[54] Q. All right. And did you have occasion to have him tell you or ask you the same things that you refer to as to Mr. Holland?

A. Yes.

Q. Now, have you ever had occasion to ride the railroad yourself as a passenger?

A. Yes.

Q. Have you ever had occasion to ride it free?

A. Yes.

Q. And do you know if——

A. No, no. Sorry, not free: Half price.

Q. Do you know if you can get a free pass yourself?

A. I am entitled to one after ten years.

Q. And ten years with your present employment?

A. Yes.

Q. And how long have you been so employed?

A. It will be ten years in September of this year.

Q. And at that time it's your understanding that you are entitled to a free railroad pass?

A. Yes, I am.

The Court: What accommodations does that mean you are entitled to, coach?

The Witness: Yes.

Mr. Engel: Q. How about a man named Freddie, do you know who he is?

[55] A. He's a car whacker.

Q. All right, and what is a car whacker?

A. Check the brakes and check everything is all right, the stanchions are all right. If the stanchions are broke, he will have to fix it.

Q. Stanchions? What are you referring to?

A. On a flatcar there is two stanchions on each car to hold the trailer up.

Q. Okay. And have you ever had occasion for Freddie to ask you or tell you to do something?

A. Yes.

Q. Like what?

A. Same as Mr. Holland and Mr. Morse.

Q. All right, anybody else down there you have had occasion—strike that.

Who is Freddie's employer?

A Southern Pacific.

Q. Now, is there any other Southern Pacific employee that you are aware of that has asked you or told you to do anything?

A. No, I can't remember.

Q. How about, is there a heavy set man there that comes down there, with a cigar?

A. Oh, yes. He works there nights. Used to work there.

[56] Q. And have you ever had occasion to have any kind of trouble with him?

Mr. Corrigan: I am sorry, Your Honor, I object. This case has gone on discovery, but I object to reference to the heavy-set man with a cigar unless he is identified.

Mr. Engel: Q. Do you know who his employer was?

A. Southern Pacific, but I don't know his name. I can't remember it.

Mr. Engel: I will submit, Your Honor, the question is what his frame of mind is, as opposed to what the actual status of the man is, anyway.

The Court: All right. Well, anyway, I am not going to worry about it. I will accept it.

But let me ask you a question here. You were talking about this man. What's he supposed to do?

Mr. Engel: The heavy-set man?

The Court: Yes.

Mr. Engel: I was just going to ask him.

The Court: Oh, all right. The question was, did you ever have any trouble with him?

Mr. Engel: Yes.

The Court: And I really would sustain that objection to that, because that calls for some kind of a conclusion. I would like to know what transpired and not just categorize it.

[57] Mr. Engel: Right, Your Honor. I didn't know he answered that yet.

Q. Have you had occasion to have some trouble with the heavy-set man that smokes a cigar that is employed by the Southern Pacific?

A. Yes, I did.

Q. All right, can you tell us what that was?

Mr. Corrigan: Your Honor, just for the purposes of the record, can I also interject an objection, unless it's established that this trouble and these conversations are prior to July 3, 1963? That's the date of the accident.

Mr. Engel: Q. All right, when was this? Was it before or after Kelley's accident?

A. I think it was after.

Q. All right. Can you tell us what the nature of that problem was?

A. Well, I was loading the train at the time, and ——

Mr. Corrigan: Sorry, Your Honor, I object to any trouble he may have had with any employees after the accident. We are interested in the situation——

The Court: Well, let's find out. Approximately when did this incident you are now talking about occur? Approximately when?

Mr. Engel: Q. What's your best recollection as to when it occurred?

[58] A. I can't remember the date.

The Court: Well, approximately the date.

The Witness: '60 to '65.

The Court: You left there in '65?

The Witness: Yes, sir.

The Court: So somewhere from '60 to '65. Did this incident occur, that you are about to relate—is this an incident that pertains to the loading or unloading of automobiles?

The Witness: Not automobiles, trailers.

The Court: A form of motor vehicle, you mean—piggyback?

The Witness: Piggyback, yes.

The Court: And these are—what is the type of a piggyback you are talking about?

The Witness: Carload vans on trailers.

The Court: It's taking them off of the flatcar?

The Witness: Yes.

The Court: To the railroad yard?

The Witness: Yes.

The Court: And taking it away by a motor and cab?

The Witness: Yes.

Mr. Engel: Your Honor, I think it goes to the weight rather than—the objection goes to the weight rather than the materiality of it.

[59] Mr. Corrigan: Except, Your Honor, that he has already testified that whenever this conversation that he's going to tell us about, if he does, occurred, it occurred after, he knows that much—it occurred after the accident.

The Court: Well, assuming that it occurred after, there may be a question of its weight, but I can't say that it's entirely irrelevant. It might have some bearing on a practice. I will permit it.

Mr. Engel: Q. All right, can you explain what transpired?

A. Well, I was loading the train at the time, and we had an early train that left at three o'clock. And we had this gentleman from back East checking a certain type of flatcar, and I had a—a van had to be on the train and he wanted me to show him how to hook up the van.

Q. Who is "he"?

A. The gentleman from back East, works for some car outfit. I forget the name. Anyway, the van missed

the train and he went over and told Mr. Helwig and I was taken off the job.

Q. All right.

The Court: The van missed the train?

The Witness: Yes.

The Court: In other words, this was a loading job?

The Witness: Yes.

[60] The Court: And you didn't get it on on time?

The Witness: Right.

The Court: All right.

Mr. Engel: Q. Now, this man that you are talking about; it was your understanding he was employed by Southern Pacific?

A. Yes, he was.

Q. Now, you mentioned the name of Jarvis and Hedland and Holland and Morse and then this heavyset man and Freddie. You mentioned that they asked or told you to do things, and you have done these things as a result of that, is that correct?

A. Yes.

Q. Now, was there any feeling on your part that a refusal to do so would jeopardize your job in any way?

Mr. Corrigan: Your Honor, I would object to that question, what his feeling might have been.

Mr. Engel: Well, one of the questions that .... All right, withdraw the question, Your Honor.

Q. Now, as to other individuals, did you see any other employees of Southern Pacific Company who checked the automobiles themselves, at any time?

A. Just Mr. Schriber or Mr. Jarvis. I am sorry.

Q. All right. How about any S.P. clerks or employees who would check for damage on the automobiles before [61] you loaded them?

A. Yes, there was.

Q. And did they do this to all automobiles that were being loaded?

A. All the used cars going out.

Q. And was this checking that they did before or after the automobiles were loaded?

A. Before.

Q. And was it your understanding this checking had to take place before the automobiles would be loaded?

A. Yes.

Q. Did you have to get some kind of a clearance from these men to see whether they had been checked or not before you could load them?

A. Yes.

The Court: What do they do, mark the car?

The Witness: Yes, put an X on it—or verbally. We will stand right alongside, and when they are finished, we will load it.

The Court: All right.

[62] Q. Have you ever had occasion to borrow money through your employment?

A. Yes.

[63] Q. And who did you borrow it from?

A. Southern Pacific Credit Union.

Q. This is one of the benefits of your job?

A. Yes.

Q. Are you familiar with the term "bad order"?

The Court: Are you a member of the Southern Pacific Union?

The Witness: Yes, I am, as of a month ago.

The Court: Beg pardon?

The Witness: As of a month ago. Not any longer.

Mr. Engel: Q. You were up to a month ago?

A. Yes.

Q. Are you familiar with the term "bad order?"

A. Yes.

Q. And what does that mean?

A. Not to load the car.

Q. All right. And who—is there something physical that constitutes a bad order?

A. Yes.

Q. What is it?

A. A bad hitch.

Q. No, I mean, how do you know something is bad ordered?

A. Well, they got carmen to check the cars.

Q. And do they put a mark on the car or something?

A. Yes, put a bad order tag.

[64] Q. A tag?

A. Yes.

Q. It's like a cardboard tag?

A. Yes.

Q. And what's your understanding of what that tag means?

A. Don't load it or don't touch it.

Q. Okay. And who puts those tags on the cars?

A. They call them car whackers.

Q. Are these Southern Pacific employees?

A. Yes, they are.

[67] Q. So in addition to breaking the chains and unhooking the chains, you had to get the plates down so you could drive the cars off?

A. Right.

Q. And it was also your job, you four men, to lift the safety rails, if you saw fit, before you started working, is that correct?

A. Yes.

Q. Is that correct?

A. Yes.

[71] Q. Now, at the time of the accident, your immediate supervisor was a man named Dutch Hauff, correct?

A. Pinkston.

[72] Q. Pinkston. Everett Pinkston, correct?

A. Yes.

Q. And Everett Pinkston was an employee of Pacific Motor Trucking Company, correct?

A. Yes.

Q. And you also took orders from "Dutch" Hauff?

A. Yes.

Q. And "Dutch" Hauff——

The Court: How do you spell his last name?

Mr. Corrigan: H-a-u-f-f.

The Court: All right.

Q. Is that correct?

A. Yes.

Q. And "Dutch" Hauff was employed by Pacific Motor Trucking Company?

A. Yes.

Q. And their superior was a man named George Hellwig, correct?

A. Yes.

[Continued on next page; nothing omitted.]

[73] Q. And he was employed by Pacific Motor Trucking Company, correct?

A. Yes.

[84] Mr. Corrigan: I will rephrase it, counsel.

Q. It's your understanding of the situation out there before 1963, going back into your memory as a working man out there, that you didn't take orders from Southern Pacific supervisors, you took from them from P.M.T. supervisors, isn't that correct?

A. Yes.

Q. All right. And apparently in the deposition that applied to Jarvis, an S.P. man, it applied to Schriber, an S.P. man, correct?

A. Yes.

Q. And the same thing was true, it applied to Holland, the S.P. clerk, correct?

A. Yes.

Q. And it applied to the car whackers, correct?

A. Yes.

[88] Q. But, in any event, it was your custom to take orders only from your own supervisors, right?

A. Yes.

Q. And your own supervisors would be P.M.T. supervisors, right?

A. Yes.

[96] The Court: Well, he means right after. In other words, you heard someone say Mr. Kelley fell, or something to that effect?

[97] The Witness: Right.

The Court: Then you saw Mr. Kelley there?

The Witness: Yes.

The Court: And the first two people to come up were Hauff and Pinkston, is that right?

The Witness: Besides the ones working on the tri-level.

The Court: Besides yourself.

The Witness: Yes.

The Court: Four of you all told. Then you say later others came, is that right?

The Witness: Yes.

Mr. Corrigan: Q. Do you know how much later it was the others came?

A. Five minutes, ten minutes.

Q. All right. But up until that five or ten minutes, the only people that were there being Hauff and Pinkston and you four teamsters, you would all have been PMT people, correct?

A. Right.

[108] Mr. Corrigan: Q. Now, when you fellows go on the piggyback ramp to unload piggybacks, you do that with the PMT tractors, is that right?

A. Yes.

Q. And is that the only tractor around there that, only company's tractor, that is, used to unload piggybacks?

A. Yes. Special tractors.

Q. Special tractor?

A. Yes.

Q. That fits the railroad car somehow?

A. No, raises and lowers the van hydraulically.

Q. I see.

[112] Q. I see. Now, the tools were supplied to you by the Pacific Motor Trucking Company?

Mr. Engel: Objection, Your Honor, without further clarification as to what he means by "tools." The question is vague and ambiguous.

The Court: Let's take the hammer. Who gave you [113] the hammer?

The Witness: We took it off the S. P. cars.

Mr. Corrigan: Q. Who gave you the ratchet?

A. PMT.

Q. And were you instructed to use the ratchet?

A. Yes, either the rachet or the hammer. Made no difference.

Q. Well, the rachet was designed to do the work, is that right?

A. Correct.

Q. And it was furnished by the Pacific Motor Trucking Company?

A. Correct.

[115] Mr. Corrigan: Yes, that's what I am talking about.

The Witness: After PMT found it was easier with the hammer, they gave us plastic hammers.

Mr. Corrigan: Q. Plastic?

The Court: What did they do?

The Witness: Plastic hammers.

The Court: They furnished you with hammers?

The Witness: Yes.

[119] Q. And at some time when you leave the tri-level with the automobile, you drive off of that edge down to the ground some way?

A. Correct.

Q. How do you get from the edge down to the ground?

A. They have a ramp.

Q. All right, and this is a moveable ramp?

A. Yes, it is.

Q. And you connect this ramp to the edge of the tri-level?

A. Yes.

Q. And then you drive the car off of it, or I should say the automobile off the railroad car, over this ramp, and down to the ground?

A. Yes.

Q. Now, with regard to the chains, I think you testified that these chains are attached and stay with the railroad car, isn't that correct?

A. Correct.

[122] A. Correct.

Q. Now, when I was asking you questions yesterday, Mr. Grimaddo, with regard to Mr. Jarvis and Mr. Hedland, Mr. Holland, Mr. Morse, and the heavy-set man with the cigar, and the problem you had with him—and Freddie, the car whacker—we talked about certain instructions and directions that you took from these people.

A. Correct.

Q. You recall that. Now, can you tell me in your mind at the time what your reasons were for doing what these people instruct you or directed you to do?

A. Yes. You had to do it one way of another.

Q. What do you mean by that?

A. They ask you to do something, you wouldn't do it, they would go to my supervisor or he would tell him and my supervisor would have to come back and tell me.

Q. All right, and did you feel that if you refused to do what these S. P. personnel told you to do, that this could jeopardize your job?

A. Yes.

[123] Q. Mr. Grimaddo, in your experience while you were working at this jobsite, this piggyback ramp area, you were aware of there being personnel there who had, in your opinion, anyway, job titles both relative to Southern Pacific and others with regard to Pacific Motor Trucking Company, is that fair?

A. Yes, sir, yes, it is.

[124] The Court: Let me ask you some questions. At the time this accident happened, did you have any doubt as to who Pinkston was employed by?

[125] The Witness: No. I don't.

The Court: Did you have any doubt as to who Hauff was employed by?

The Witness: No, I don't.

The Court: Did you have any doubt as to who Holland was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom—was it Pryal?

The Witness: George Pryal.

The Court: As to whom he was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Oosterbaan was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Kelley was employed by?

The Witness: No.

[126] Jarvis was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Mr. Hedland was employed by?

The Witness: No.

The Court: Now, there were also a couple of others. There was Freddie, a car whacker. Did you have any doubt in your mind as to who he was employed by?

The Witness: No.

The Court: And you also had in mind the man with the cigar?

The Witness: Yes.

The Court: Did you have any doubt, at least in your own mind, as to whom he was employed by?

The Witness: No.

The Court: What can you develop on that?

Mr. Engel: Did we mention Mr. Hedland?

The Court: How about Mr. Hedand?

The Witness: No.

Mr. Engel: Q. You have no doubt?

A. I have no doubt.

Q. All right. And who was he employed by?

A. Southern Pacific. And Mr. Schriber, I was never sure whom he was employed by.

The Court: Mr. who?

[127] The Witness: Schriber.

The Court: How do you spell that?

Mr. Engel: S-c-h-r-i-b-e-r.

The Court: What instruction did he ever give you?

The Witness: I can't recall offhand, but I know he told me to do something.

The Court: Did you obey him?

The Witness: Yes, as far as I know.

The Court: Why did you do it, if you tell me you don't know who he was employed by?

The Witness: He was either P.M.T. or S.P. I didn't know which one.

I knew at one time he worked for P.M.T., but I didn't know if he was still P.M.T. or S.P.

[131] Q. All right, and just generally how are they connected to the railroad car?

A. Well, they were chained to a fixed ratchet assembly on the floor of the railroad car, and you would take this ratchet and release the tension and go on to the next car, and then a man working with you as a partner would be following you on that side of the automobile, and he would take the chain, which was at that time slackened, and drop it to the floor of the car.

Q. All right. He would unhook it from the automobile?

A. Right.

[132] Q. All right. Before this process is begun of actually, you know, disengaging the chain, and even before **[133]** the chain is unloosened, is there another step that precedes that with regard to unloading the automobiles?

A. Well, yes. Yes, you'd have to put the keys in the automobiles that you were going to work on, drop the plates, and they have safety rail equipment that had to be raised.

[135] The Court: All right. Now, you say some of this work was done before you started loosening the chain, is that right?

The Witness: Well, that would depend, if I did it myself. I mean, sometimes if it was my job to do it, or if somebody else did it ahead of me, I took on the next job.

The Court: Well, was it an employee of P.M.T. that did all this?

The Witness: Yes.

The Court: He put the key in the car?

The Witness: Yes.

The Court: Lowered the window?

The Witness: Right.

The Court: And raised the safety rail?

The Witness: Right.

The Court: And lowered the plates?

The Witness: That's right.

[136] The Court: All right. Did the Southern Pacific employees ever do that, to your knowledge—as you recall it?

The Witness: Not while we were unloading automobiles. If they did, they did it to check the plate, or do some work on the car itself—the railroad car.

The Court: In the actual operation of unloading, this is something you or one of the men did with you did. To the best of your recollection, this is true, each day?

The Witness: That's right.

The Court: All right.

Mr. Engel: Q. All right, who was involved in the conversation that you either overheard or that was centered around where you were up there on the trilevel?

A. Well, Mr. Hauff or Mr. Pinkston were the supervisors on duty that day, and I know that either one of them or both of them were there with me, because they were giving me instructions to go along the top deck and check these railings and pull them up.

We started out with the car that the accident occurred on and then we went from there. But the conversation below me, from what I can remember it was about, was that, whose responsibility was it to put these safety railings up if they weren't in working order.

Q. All right, and what was said by the—the gist of what was said? Was one person saying it was the

other person's responsibility, or what was the gist of it?

A. Well, my supervisor asked me, Mr. Hauff or Mr. Pinkston asked me why I didn't put them up, and I said, "Well, there's times that they can't be put up; they are just not in working order." And he said you know, "What do you do [144] about this?

And I says, "Well, we have no other tools or anything to fix these things."

And then he asked the car mechanics why they didn't check these, and they said, well, they only checked the bottom part of the cars, the wheels or axles, I believe. They gave some other explanation. But they said they had no way of checking them unless they went up and pulled them up themselves. And then they continued to—I continued to walk down from car to car and check all these railings, and I believe it was Mr. Hauff, as we went along, said, "Well, look how many of them don't work."

Q. All right, but was there any conversation with regard to the fact that it was the car whacker's responsibility to do this?

Mr. Corrigan: I am sorry, do what?

Mr. Engel: Well, that's what I am going to ask him.

Q. There was discussion about the car whacker's responsibility with regard to the safety railings?

A. Well, the way I could answer that was, it was our responsibility to put these safety rails up, but it was not our responsibility to get them up if they

weren't in working order, or the cable was broken, or the hook was missing.

[147] Mr. Engel: Your Honor, are Exhibits 6 and 8 in evidence?

The Clerk: Yes.

Mr. Engel: Q. Now, you said something about something that would lead you to rely on the cable. What are you referring to?

A. Well, when you say the railing, I mean the cable itself.

Q. All right.

A. This is what makes the railings. Now, these poles, these upright poles that support the cable, they—like I said, it was sometimes you would see them up permanently, but the cable was not drawn. This is part of it, making sure the cables are good. Well, because of this hook thing or clamp that secured it after it went through the eye, and made it almost impossible to come out, if that was missing and somebody was walking from the other end of the car, which could have been seventy-five feet walking, relying on this railing and flexing and everything, the hook would rotate out, come out of the eye. The railing would just drop completely with the pressure of your hand or your body leaning against it, or whatnot.

Q. All right, and is it your opinion that that is why that railing was not up that day?

[148] A. Yes, sir.

[151] Q. And who was he employed by?

A. He was employed by the Southern Pacific Railroad.

Q. And would Mr. Holland on occasion give instructions to or tell you or other members of this crew things to do?

A. He has on occasion.

Q. All right, and did you people do it, as far as you knew?

A. As far as I know, when he asked me to, I did.

Q. All right. How about a Mr. Hedland? Know Mr. Hedland?

A. Yes.

Q. And do you know who he is employed by?

A. Best of my knowledge, Southern Pacific Railway.

Q. And did he have occasion to tell you or other members of your crew things to do?

A. Now, myself, no. I have talked to Mr. Hedland many times, but I can't remember him giving any instructions, myself.

Q. All right, have you ever had occasion to hear him or have knowledge of his giving instructions to other members of the crew out there?

A. Not to my memory, no.

Q. All right. How about—do you know a man named Jarvis?

A. Yes.

Q. All right, do you know who he is employed by?

A. Again, I believe the Southern Pacific Railroad.

Q. All right. And can you tell me, did you have occasion to see him out there?

A. Yes, quite often.

Q. And when you say quite often, about how often are you talking about?

A. Well, they had a program of shipping cars out of this San Francisco terminal here, and he was responsible for making sure they were tied down properly and according to the specifications, or whatnot, so no damage could occur to them during transit. And he would come down and handle this program, and we would work with him on it.

Q. All right, when you say you would work with him, what specifically would happen?

A. Well, he'd have diagrams and ideas on how to tie these cars down so they wouldn't become—you know, there was a certain amount of vibration and everything on the railroad car while it was going to its destination, and he wanted to make sure these automobiles didn't become loose and rub, hit each other and all this—to keep the claims down on them. And he had ideas and diagrams of how to tie them down. We executed them for him.

[153] Q. All right. In other words, did he tell you to do it certain ways and you would do it?

A. Yes.

Q. And did he physically participate with you in doing these things?

A. Yes, he was very concerned with the operation.

Q. All right. I mean, in other words, he would physically get onto the car with you?

A. I have seen him on the car with us at times, yes.

Q. Participating in hooking and unhooking an automobile or demonstrating that process?

A. That's right.

Q. All right. And in particular do you remember any piece of equipment that he used to carry around that the men referred to, in fact?

A. Yes, he carried a mirror. It was an extended mirror on a handle, sort of thing. And this way he could look underneath the car and the suspension, reflect where the chain was rubbing or was connected to.

Q. Okay, and he would show you how the chains were hooked under there?

A. Right. I believe he just used it so he wouldn't have to get down in his suit. We had coveralls, so we . . . .

[154] The Court: How long had you been working there in this capacity?

Mr. Engel: You mean up to the time of the accident?

The Court: Yes.

The Witness: Three years.

The Court: All right.

Mr. Engel: Q. And can you tell me, what did Mr. Jarvis call you?

A. Well, he knew me by my first name, Connie.

Q. All right, and about how often would you say you saw him?

A. When this program started down there, we saw him daily.

Q. Okay.

A. And I can't tell you exactly from memory how long a duration it was, but . . .

Q. All right, now, in doing this with you, did he ever say anything to you with regard to the railroad?

A. Well, he would tell us that they were having a probem when these cars got to the destination with damage to them, and they believed it was due to the way they were tied down. And when he came along with these diagrams to show us what they had in mind to secure them that way, he'd say, you know, this is what the railroad wants **[155]** as far as they want these shipped.

Q. All right. Now, how about a Mr. Schriber? Know who he is?

A. Yes.

Q. Do you know who his employer was?

A. Again, I believe it was Southern Pacific, as far as I knew.

Q. All right. And did you have occasion to see him down there?

A. Yes, he was down there more than once.

Q. All right. How often was he down there? How would you describe his being down there?

A. Well, he was more attached to the van piggyback service, which was right in this yard, and they were always trying to improve their loading operation on the mechanics of how it was loaded on a car, and whatnot. And he would come down to see the demonstration. For instance, a new truck would come out, or something to do this, so he would come down and observe.

Q. All right. Now, would he do like Mr. Jarvis, and physically get up and participate with the employees on the hooking and unhooking, showing you how this was to be done, as far as your seeing?

A. As far as my memory, no. I know he was a close as the—I would say the grease or dirt would allow you, **[156]** know.

Q. All right. And did you have occasion to work with him yourself before?

A. Yes, when I was over on this type operation.

Q. And he would ask you or tell you to do things?

A. Yes.

Q. All right. And you would do them?

A. Yes.

Q. All right. Did he also say anything about what the railroad wants?

A. Well, I can't remember word for word he said it that way, but, "This is what we would like to do on this. This is what we would like to try."

Q. Now, have you ever had occasion to see any other S.P. employees come down there en masse—in other words, more than one, or a group of them, on any occasion?

A. Yes.

Q. All right, can you tell me what you have seen?

A. Oh, I'd see a couple there, company automobiles arriving with these gentlemen, which you—you only took for granted they were working for the railroad.

Q. You say you did take that for granted or—?

A. You just took that for granted. And they would come down and observe some type of operation,

whether it was a piggyback or some car that might have been put in there on **[157]** a siding for them to examine in some way.

Q. All right, and how many have you seen on accasion, in numbers?

A. Oh, as many as, I'd say, twelve. A dozen.

Q. Now, have you ever had occasion to get a free pass on the railroad?

A. Yes, I did once.

Q. All right, and how did you get that?

A. I requested it through the office, to take my family to Disneyland.

Q. When you say "the office," what is that?

A. The office in our terminal there on Sixth Street.

Q. And is that office still there?

A. Yes, it is.

Q. Have you seen any pictures of it lately?

A. Yes, I have. There's one right there.

The Court: Is that the S.P. office or your office you are talking about?

Mr. Engel: Q. What are you referring to when you say it's right there?

A. Well, here it is. It was at an angle of this yard that we had—the piggyback.

Q. All right, could I ask you to put an arrow pointing to that place?

[158] The Court: Whose office is this, P.M.T. or S.P.?

The Witness: It was a P.M.T. office where we . . . .

Mr. Engel: Q. Can you just put an arrow pointing to it, please? Put the point coming down from the top.

A. Okay. [Marking]

Q. And show you Plaintiff's Exhibit No. 5, the top photograph on there, is that the same building you are referring to?

A. Yes, that's it.

Q. All right, and what does that building say on the side in large letters?

A. Says "Southern Pacific."

Q. Now, just briefly, if you could, look through those five photographs that are marked Plaintiff's 5. Can you tell me what those photographs are of, generally?

A. This is of the main terminal that we had here in San Francisco.

Q. Is this in the general area where you worked?

A. Yes.

Q. Can you tell me what your check said that you received around the time that this accident happened, as to who it came from?

A. Had "Pacific Motor Trucking" on the top, large letters.

Q. Say anything about "Southern Pacific" on it?

[159] A. Yes, it had "Solely owned subsidiary of Southern Pacific," I believe.

[160] Mr. Engel: All right.

Q. Mr. Oosterbaan, let me ask you this. From time to time while you were down there, in your experience with regard to yourself or with other members of the crew down there, would you have occasions where you might, you know, sneak a break when you weren't supposed to, or something like that, to have a cigarette or just a chat or something?

A. Oh, yes, I'm sure that happened.

Q. All right. Now, when you were doing that, would [161] you say that you were, there was some, you know, thought given or concern given as to being caught taking a sort of improper break?

A. Sure, there was a lot of concern.

Q. All right. Now, when you had this concern, can you tell me, did you have concern that you would be caught by S.P. people or P.M.T. people?

The Court: How about Mr. Hellwig?

The Witness: Oh, he had some influence there.

The Court: He had some influence there? That would concern you, wouldn't it?

The Witness: Sure would.

The Court: Mr. Pinkston?

The Witness: Yes, it would.

The Court: Mr. Hauff?

The Witness: Yes, it would.

The Court: Mr. Holland?

The Witness: It would, too.

The Court: All right. Mr. Schriber?

The Witness: It would.

The Court: Hedland?

The Witness: Yes. But I would have to say that, too, you would take into consideration the personality, what kind of a person the boss was.

The Court: Yes.

[162] The Witness: Or the man was.

The Court: Who did you consider the boss?

The Witness: Well, I considered my P.M.T. supervisor the boss.

The Court: Mr. Pinkston and Mr. Hauff?

The Witness: Right.

The Court: How about Mr. Hellwig, did you consider him being superior to them?

The Witness: Sure did.

The Court: All right. Well now, of all these people that you name, who would you consider the basic, your basic authority, the man you would obey?

Mr. Engel: Well, Your Honor, if I may object to your question?

The Court: Yes.

Mr. Engel: "Basic" is ambiguous.

The Court: All right.

Mr. Engel: And also I don't think this question is one of exclusiveness. In other words, the Court's question——

The Court: Oh, I recognize it's not one of exclusiveness, but nevertheless it is very relevant and material.

Mr. Engel: Well, certainly, Your Honor. But it could mislead the witness, too.

The Court: Well, I have asked him all the names. **[163]** I am satisfied with the questions I have asked, and I am making no observation with relation to the consequence or effect or the weight of the answers given.

Mr. Engel: All right.

The Court: All right.

Mr. Engel: Q. Now, do you know, are you familiar with the term "bad order"?

A. Yes.

Q. All right, what does that mean?

A. Well, when that was put on a piece of equipment, the equipment wasn't allowed to be used for loading or to be moved.

Q. All right, now, was there some physical designation that was attached to—strike that.

This term "bad order," this applies to the railroad cars down there?

A. Well, it also applied to trailers and tractors we drove.

Q. Okay, and was there something physically attached to the equipment that would make it a bad order?

A. It was a bad order sign.

Q. All right, and this was attached to railroad cars also?

A. Yes, it was.

Q. And who put it on the railroad cars?

[164] A. The mechanics for the railroad.

Q. Meaning who?

A. Well, any mechanic could put it on.

Q. All right.

A. For the railroad.

Q. And if that were—did this say—strike that. Did these individuals ever tell you then to, like, not a work car because it was bad ordered, or anything like that?

A. Yes, they advised us of the bad order.

Mr. Engel: All right.

The Court: What did the bad order mean to you, that you should or should not do?

The Witness: Well, in regard to the railroad, if I saw a car that was bad ordered, a railroad car, re-

gardless if it was loaded or empty, but I was going to do something with it, I wouldn't touch it until I found out.

The Court: All right.

Mr. Engel: Q. And who would you find out from?

A. Well, if the mechanics were right there on the track, I would ask them.

Q. All right, with regard to the automobiles themselves that would go on the tri-levels, were these automobiles inspected before they would get on the tri-levels?

A. Yes.

[165] Q. And was some mark made on the automobile that would indicate that it had been inspected?

A. Well, when it first started, we had to go find the clerk that was checking them in. This was a pretty large lot, there was a lot of walking done. So if you could save yourself a few steps, you would figure out between your own people some way of telling you this. So we started, this clerk would start marking windshields of the ones that were okay, so as you came down from the train you could grab an automobile and drive it up and load it.

Q. Now, when you say it was okay, it was okay for what?

A. It was okay to load, because it had been checked.

Q. All right, and before the markings were put on the window, how did you find out if it was okay to load?

A. You just asked him.

Q. And who would you ask?

A. The clerk that was checking.

Q. Who was his employer?

A. The railroad, Southern Pacific.

Q. All right. In other words, you would have to get approval from him before you could put the car on the tri-level, or the automobile on the tri-level?

A. Well, like I said, he was right there and he was the man that was responsible for it, so you just ask him.

[166] Q. All right, but what I am driving at is, you couldn't put it on until you obtained that information from him?

A. That's right.

Q. All right. Did you ever have occasion where you would be standing around and it appeared you weren't working, and the reason you weren't working was because these cars had not been checked, and somebody would ask you why you were not working?

A. Yes.

Q. All right, and——

A. This has happened.

Q. What would you say to him?

A. Well, we would say the cars either hadn't been inspected, the automobiles hadn't been inspected, or the railroad cars hadn't been inspected.

Q. All right. So either or both, it was the automobiles or the railroad cars themselves, you would have to sort of get an okay from the railroad before you could perform this job of putting the automobiles on the tri-levels?

A. Yes. But it wasn't completely our responsibility. For instance, like I said, if the man was right

there, you asked him. But sometimes my supervisor might come down and say, "They are all right to load."

[170] The Court: All right, I would like to ask just a couple of questions now.

Mr. Oosterbaan, you testified that before starting the operation of loosening the chains, which Mr. Kelley would unhook, that you would put the key in the automobile, raise the window, put down the plates, is that right, and raise the safety rails? Is that right?

The Witness: That's right.

The Court: Now, raising the safety rail meant seeing that the posts or stanchions had been raised, that the cable ran through the eye, that it was properly hooked and secured?

The Witness: That's right.

The Court: Is that right?

Now, you did this, you and one of your crew did this every time, is that right?

The Witness: Not myself, but two people.

The Court: Two of you.

The Witness: Somebody from the crew did that.

The Court: Somebody from the crew. And you are talking about a P.M.T. crew now?

The Witness: Right.

The Court: One of you did that, or one or more of you did that, is that right, each time?

The Witness: Yes, sir.

[171] The Court: Now, do you have any recollection as to this specific morning, as to who did it?

The Witness: No, I don't.

The Court: All right. Now, you say one or more of you did it. Did Southern Pacific employees do this job of raising the poles and testing the cable?

The Witness: No.

The Court: It was always one of you gentlemen?

The Witness: [Nodding head.]

[173] Q. Now, did you have a rachet assigned to you by the P.M.T.?

A. No, they were in a tool box that we just went and got and used them.

Q. A P.M.T. box?

A. Right.

[174] Mr. Corrigan: Now, Mr. Clerk, do you have the ratchet that the man gave you yesterday?

The Crier: It's underneath there (indicating).

The Court: Does he have what?

The Crier: There it is. Underneath here (indicating).

Mr. Corrigan: Oh, I have it.

Q. Now, is this what the P.M.T. gives you to break loose the thing that's holding the chain?

A. Right.

Q. This is what you were using?

A. Yes.

[180] Mr. Corrigan: Q. All right, Mr. Oosterbaan, yesterday when we recessed, we were talking about the rachet device, and I just want to ask a few more questions about that procedure and go on to something else.

The rachet was the normal tool used to loosen the chain with, is that correct?

A. That's right.

Q. Now, from time to time the chains that were attached to the rachet would become kinked, I take it, so that they wouldn't be perfectly straight?

A. Yes. This wasn't uncommon.

Q. And that would cause the mechanism that you were to release to bind in some way, is that correct?

A. That's right.

Q. And so on those occasions you might hit the chain with a hammer to unkink it, so to speak, is that so?

[181] A. That's right.

Q. So we have it straight, on the day in question, when the accident happened, your best recollection is that you were using the rachet wrench that I showed you yesterday?

A. The best as I can remember, yes.

Q. And I may have misled the record a little bit. The device I showed you that was identified yesterday was what is known as a rachet wrench with extension, is that correct?

A. Yes.

Q. And the rachet itself is actually the device that is a part of the railroad car?

A. Right.

[188] Q. With reference to the days and weeks before the **[189]** accident—understand?—at the place where the accident happened, the only Southern Pacific personnel who worked in that area, that immediate area, would be Mr. Holland, Mr. Teijeiro and Mr. Graham, right?

Mr. Engel: Objection again, Your Honor. When he's talking about work, that calls for a legal conclusion. If he is talking about, did he see other people there and it appeared they were performing functions, he can testify to that. But the opinion with regard to work is a legal conclusion.

The Court: Well, I don't know.

Mr. Engel: He has already testified as to several other people that were down there all the time, or often, anyway.

The Court: You want to read the question, please?

[Question read.]

The Court: All right, do you know of any others who worked in that area?

The Witness: Not on an everyday basis.

The Court: All right. Then those are the men who worked on an everyday basis?

The Witness: Those are the men I saw every day, I am sure.

The Court: All right.

[193] Q. Now, with reference to the time of the accident, just after it occurred, you do not recall, do you, any Southern Pacific employees being there at the scene?

Mr. Engel: This is at what time?

Mr. Corrigan: At the time of the accident, when it occurred.

Mr. Engel: The moment it occurred?

Mr. Corrigan: The moment it occurred and for a time thereafter.

A. At the moment it occurred there was no S.P. employees that I remember seeing.

[198] Q. Okay. Now, do you recall that there was a booklet that was—you have seen a booklet that has

been printed up pertaining to the loading and unloading of automobiles?

A. Yes.

Q. All right, and do you remember who put that book out?

A. It was the Southern Pacific Railway.

Mr. Engel: May we have this marked as Plaintiff's next in order, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 10 marked for identification.

[Document described below was marked Plaintiff's Exhibit 10 for identification.]

Mr. Engel: I will just offer it in evidence.

[203] The Court: All right, okay. I am just off the record now.

[Colloquy off the record.]

Mr. Engel: Your Honor, if I can, I would like to call the Court's attention particularly to certain portions of that, if I could.

The Court: All right. This is going to be all subject to motion to strike.

Mr. Engel: Starting out, it's entitled "Introduction."

"The automobile or truck temporarily entrusted to your care and handling is a complex machine worth on the average of $3,000 to $6,000. Countless hours of engineering design and construction skill have gone into making it an attractive, durable piece of equipment, designed to serve——"

The Court: All right, this must be all pre-Nader.

[Laughter.]

The Court: Go right ahead.

Mr. Engel: "—designed to serve and satisfy its purchaser. The least carelessness can result in damage to the vehicle and thus reduce its value and utility, as well as result in a costly damage claim. This causes dissatisfied customers for our company and the automobile manufacturer. Excess **[204]** speed damages engines, transmissions and tires. Tie down hooks and chains improperly applied crack and rupture the frame. Forgotten tools in pockets cause scratches and dents. Doors opened carelessly chip paint. The aim of this booklet is to help you do a better job of handling motor vehicles and thereby reduce damage. We ask you to read and understand a few simple rules presented here, but there is no need to memorize them. In fact, almost everything in this book can be summed up in these few words: Treat every vehicle you handle as if you had just purchased it."

That's the introduction, Your Honor. Then on Page 2 of the booklet under the caption of "Safety," the subcaption is: "Safety of Personnel and Equipment Must Be the First Consideration. Authorized signs reading 'employees working,' white lettering on red background, must be placed at the end of the last rail car before loading or unloading crews start work on each track. Sign must be removed after work is completed and cars ready for movement. White light is to be attached to this sign when used at night. Raise safety rail before working on top deck of rail

cars. Do not exceed five miles per hour when driving on rail cars and twenty miles an [205] hour in parking areas. Spring action resulting from excessive speed on rail cars can damage tops and underframes of vehicles. Slower speeds must be observed when necessary for safety. When it is necessary to ascend or descend ladders on rail car, always face the car. Watch your step at all times when on or around cars and transports. Never throw tools from decks of rail cars or transports to the ground. Make sure bridge plates are raised and locked before rail car is moved."

And over on Page 9 under the caption of "Unloading:"

"When unloading, observe the safety and general rules in the front part of this booklet, being particularly careful to avoid possible roof and underbody damage when driving through rail cars. Always use seat and floor protectors. Park vehicles carefully, closing hoods, deck lids, doors, windows, heater vents and door vent windows, and turning off electrical accessories and lights. Use only wrenches furnished to release rachets. Hammering on rachet assemblies as an expedient to release chains is prohibited. Hooks must be removed from vehicles by hand."

The Court: By the way, aside from that booklet, were those the instructions you had received in the course of [206] your employment?

The Witness: Yes.

The Court: Did he read anything that was not an instruction you had already received?

Mr. Engel: "Already" meaning what?

The Court: Received or informed by some source.

Mr. Engel: You mean before he saw the booklet?

The Court: Did someone ever give you instructions of this character? We will find out who.

The Witness: As far as somebody in the company showing me exactly how to do the operation, I never was instructed.

The Court: All right.

The Witness: Never saw anything written on it.

The Court: Did someone give you instructions with relation to safety and speed of travel and use of the cars and things of that sort?

The Witness: Never.

The Court: Never did?

The Witness: Never.

The Court: But you had seen this booklet?

The Witness: I have seen it. It came out in my mailbox with the company.

The Court: And that's the first time that you received the equivalent of instruction, regardless of source?

[207] The Witness: Right.

The Court: With relation to five miles an hour on the cars, twenty miles an hour on the lot and the springs?

The Witness: That's right.

[210] Q. All right. And you have had occasion to take it off?

A. Many times.

Q. Okay. And did you ever have occasion to have an S.P. switchman tell you to take that flag off?

A. So they could pull the train?

Q. Right.

A. Yes.

Q. All right. And you would do that?

A. Yes.

Q. Okay. Did you ever have occasion for them to tell you to put one on? In other words, the cars would be in there and there wasn't any flag out?

A. No, not to my knowledge, on putting them on.

[213] Q. All right. Did you find working down there that even if the S.P. personnel were not giving you instructions directly, that you and the other members of the crew down there were aware of the fact they were communicating to your supervisors for the purpose of getting you to do things?

A. In the job we had, it was almost always that way.

Q. All right. And did you also—you, and as far as you know, the other personnel working down there—were you of the opinion that if they came up to you and asked you to do something, that if you didn't do it, you knew they were going to tell your supervisor to get you to do it anyway?

A. Can I have that question again, please?

Q. You fellows that worked down there on this crew, were you aware—you, personally, and as far as you know, the other members of the crew—that if the S.P. personnel asked you or instructed you or requested you to do something, **[214]** that if you didn't do it, they would just go to your supervisor and get him to tell you to do it anyway?

A. Yes, that probably would be the alternative.

The Court: Let me ask you a question. Was that particularly significant? You knew what your job was, didn't you?

The Witness: That's right.

The Court: And if an S.P. man told you to do something that wasn't in your job, what you did routinely and regularly, would you do it?

The Witness: I'd have to evaluate how out of the way of my line of work it was.

The Court: Yes.

The Witness: You know, if it were something that——

The Court: If it was something in your line of work you would do it, and all you would be accepting was a suggestion, it that right?

The Witness: I would do it, I would do it.

The Court: Something you would be prepared and willing to do even without a suggestion?

The Witness: That's right, it was all work.

The Court: Well then, the work, the routine—the nature of the work was such that you didn't require very much instruction, did you?

The Witness: No.

[216] Q. Unfortunate souls hanging around there. If they came up and asked you to do something, would you do it?

A. No.

Q. All right, how about if you had a teenage kid come in there, about fourteen years old, and he asked you to do something, would you do it?

A. No.

Q. How about a girl of about twenty-five—I will take that one back.

How about an older lady, or one who you physically didn't think was interesting; if she asked you to do something, would you do it?

A. No.

Q. All right. If somebody came down there that you recognized was not an S.P. personnel, would you do it? Say a man showed up with an ice cream truck?

A. No, I wouldn't.

Q. All right. Now about somebody who showed up and he obviously had some insignia on him that somehow showed that he wasn't an S.P. man, like a gas station uniform or a postman or anything like that? Would you do it?

A. No.

Q. So when these people asked you to do something, you recognized that they were Southern Pacific personnel, isn't that right?

[217] A. Absolutely.

Q. And that's why you did it?

A. That's right.

[232] Q. And where were you, specifically, when the accident happened?

A. I was about 400 feet from there with my partner, Manuel Teijeiro, and the foreman, James McTernan.

[233] Mr. Engel: Q. What was your first awareness that an accident had happened?

Or let me ask it this way: You did not see the accident happen?

A. No, I did not see the accident.

[234] Q. What was your first awareness that an accident had happened?

A. We saw the ambulance backing up in the distance, and we figured there was an accident somewhere.

Q. All right, and so what did you do?

A. We walked over towards it.

Q. And did see Mr. Kelley?

A. There was a crowd around this particular area and Mr. Kelley was there, yes.

[263] A. Yes, sir.

Q. May I see them, please?

Have you reviewed these documents?

A. Yes, sir.

Q. And do you know anybody else that's reviewed them?

A. Yes, I believe possibly Mr. Edwards.

Q. How about Mr. Corrigan?

A. Mr. Corrigan? Yes, I believe he has, sir.

Q. All right. How about Mr. Roy?

A. I assume he has, too, sir.

Q. Those two gentlemen are the two attorneys here?

A. Yes, sir.

Q. For Southern Pacific Company?

A. Yes, sir.

Q. You gave them authority to inspect it?

A. Yes, sir.

Q. And how did they know that you were going to bring these documents with you?

A. How did they know, sir?

Q. Right.

A. I was served a subpoena as I was leaving my office last Friday night, and I immediately contacted Mr. Corrigan about it.

Q. Why did you immediately contact him?

[264] A. I beg your pardon?

Q. Why did you immediately contact him?

A. Because I knew he was the attorney in the case.

Q. For who?

A. For the Southern Pacific Company.

Q. Were you instructed that you were to contact him?

A. No, sir.

Q. Well, how did you even know who he was?

A. Well, he is a member of the—that is, of the company's law department, of the Southern Pacific Law Department.

Q. I notice there are a lot of documents in here signed, or appear to be copies of documents signed by Mr. Corrigan, is that correct?

A. Yes, sir.

Q. Is it customary for you in files that you have to receive copies of material that Mr. Corrigan has issued?

A. Yes, sir.

[268] Q. Now, before your deposition was taken, did you have a conference with the Southern Pacific attorneys?

A. Did I have a conference?

Q. Did you talk to them ahead of time about your deposition?

A. Yes, of course I did, certainly.

Q. And was this at your request or——

A. Beg your pardon? Mr. Roy at that time was our attorney, P.M.T. attorneys.

Q. At the time of your deposition?

A. Yes, sir.

Q. And since that time he's become a Southern Pacific attorney?

A. Well, he could be both under certain circumstances.

Q. Well, what you are saying, then, is when he asked you to come to his office before your deposition, you understood him to be a P.M.T. lawyer?

A. Yes, sir.

Q. Do you know if he'd been a Southern Pacific lawyer before that?

A. Yes, he had.

Q. Had he been a Southern Pacific lawyer after that?

A. I presume so, yes.

[278] A. Have I ever had one, sir?

Q. Yes.

A. Yes, sir.

Q. And how long have you been working?

A. Thirty-six years.

Q. And do you have a free pass now, after ten years with the railroad?

Yes, I do.

Q. All right. That's with the—you receive that through your employment?

A. Yes, sir.

Q. And who do you work for?

A. I work for Pacific Motor Trucking Company.

[281] The Court: What do you mean by that, more apparent?

Mr. Engel: Your Honor, I will use it in argument, and I will argue about it. I think there was something that was significantly shown by Mr. Calkins that does have relevancy, and a great deal of materiality, to this case.

The Court: You mean that he went to lawyers for the Southern Pacific and responded to their directions?

Mr. Engel: Well, that would be part of it, Your Honor. I am not saying that it is——

The Court: I have very substantial difficulty, very frankly, I say again, in finding anything of any real relevancy here except possibly the fact that he had a free railroad pass—which may be more indicative of a relationship between P.M.T. and the Southern Pacific than all the rest of the stuff that you made any reference to.

Mr. Engel: All right. Well, Your Honor, what I was alluding to was that to a jury as a trier of fact, and who did not have the same sophistication that the Court does, until the end of the interrogation of Mr. Calkins, I think it would have been highly confusing as to "who he works for." It wasn't until the end that I asked him who he worked for, and up until that time it seems to fluctuate back and forth.

[282] By Mr. Corrigan:

Q. What is the title of your office?

A. I am manager of safety and personnel.

Q. With Pacific Motor Trucking Company?

A. Pacific Motor Trucking Company.

Q. When did you come to work for that company?

A. 1934, about this time in '34.

Q. What year was that company formed?

A. 1930, I believe it was.

Q. And has it been in the trucking business, to your knowledge, ever since?

A. Yes, sir.

Q. To your knowledge, has it always been a wholly-owned subsidiary of the Southern Pacific Company?

A. It has that.

[283] Q. Now, does your company own trucks and tractors?

A. Yes, sir.

Q. Now, a few preliminary questions. How many trucks does your company own?

A. Approximately sixty-five hundred.

Q. Six thousand five hundred?

A. Yes, sir.

Q. And in how many states does your company operate?

A. Seven.

Q. The Western states?

A. Yes, sir.

Q. How many employees does your company have?

A. Approximately four thousand at this time.

[284] The Court: You said in a number of states, is that right?

The Witness: Yes, sir.

The Court: You operate in the State of Washington?

The Witness: No, sir.

The Court: All right. You operate in the State of Oregon?

The Witness: Yes, sir.

The Court: All right, go ahead.

[286] Mr. Corrigan: Q. Now, Mr. Calkins, at the time of Mr. Kelley's accident, was there in effect a collective bargaining agreement which affected the men in Mr. Kelley's capacity, and other teamsters working for the Pacific Motor Trucking Company in the City of San Francisco?

A. Was there a contract?

Q. Yes, sir.

[287] A. Yes, there was.

Q. All right. Now I want to show you a little booklet and ask you if that was the contract that was in effect between Pacific Motor Trucking Company and——

A. It was during the period of 1961 or 1964.

Mr. Engel: Your Honor, may I object to the question before the answer gets in? I don't see the relevancy of that either.

Mr. Corrigan: I will point out the relevancy.

The Court: What is the relevancy of the contract?

Mr. Corrigan: Right directly on the question of control, if permitted to produce this.

The Court: In other words, your theory is the bargaining would be with Southern Pacific and not with P.M.T.?

Mr. Corrigan: No, my theory is that the collective bargaining agreement, if admitted in evidence, will show that the Pacific Motor Trucking Company negotiated a contract which dictated to Pacific Motor Trucking Company under the terms of the agreement how their employees in some ways would be controlled, and by whom, on the piggyback ramp in San Francisco where this accident occurred, on the date of the accident.

The Court: All right, well, I think if that's the purpose, I think it is admissible.

Mr. Engel: All right, Your Honor. I would object [288] to Mr. Calkin's interpreting the contract, though. I think the document speaks for itself.

The Court: Well, that's fair comment.

Mr. Corrigan: Let's see how far we get.

Q. Mr. Calkins, is that the collective bargaining agreement between Local 85 and the Pacific Motor Trucking Company?

A. Yes, sir, the entire industry as well.

Q. Now, when you say the entire industry, that involves other trucking companies and Local 85?

A. Yes, sir.

Q. Just so we will have some understanding, name two or three who might also come under it.

A. P.I.E., Delta Lines.

Q. These are other truckers?

A. Yes, sir.

Q. All right. Now, does that contract have in it, as of the date of this accident, a provision for conduct at piggyback ramps?

A. Yes, sir, it has a piggyback provision in it.

Q. All right. Now, on what page does the piggyback provision, where do you find it?

A. It's on Page 23.

Q. Now, with reference to he piggyback provision . . . May I see that, sir?

[289] Mr. Engel: May I see it before we go into it?

[Colloquy between counsel out of hearing of the reporter.]

Mr. Corrigan: Q. By the way, Mr. Kelley was a teamster, is that correct?

A. Yes, sir.

Q. Came under the provisions of this collective bargaining agreement?

A. At that time he did, yes.

Q. By the way, do your labor relations, so far as you understand them—do you ever get involved in labor relation matters?

A. Frequently, sir.

Q. Is it your understanding that your company, from past experience, from your direct knowledge—things that have happened in the way of labor strife—you come under the National Labor Relations Act, do you understand that?

A. Yes.

Q. All right. Now I want to refer you to this agreement that was in effect at that time, and the piggyback, Article 9, commencing on Page 23.

The first subheading under "Piggyback," under Article 9, is sug(a). Would you read that, please? Just read it exactly as it is.

A. "There shall be no accident letter for piggyback [290] unless negligence is proved on the part of the employee."

Q. All right, now, what is an accident letter?

A. Well, it's a warning letter, it's a letter of instruction, it's a letter of reprimand, if you wish to call it that.

Q. All right. Now read sub-paragraph (b), please.

A. "Rain gear, overalls, gloves and protective clothing shall be furnished by the employer and shall be maintained at the expense of the employer."

Q. That's Pacific Motor Trucking Company?

A. Yes, sir.

Q. And has it been your experience that you are required out there to furnish that gear to those men?

A. Yes, sir.

Q. Now with reference to sub (c), please read that.

A. "Any unsafe conditions in tri-level and bi-level will be corrected immediately."

Q. Now, this is not an agreement that involves any railroads, is that correct?

A. No, sir.

Q. All right. Now, I want you to read slowly and very clearly sub (d).

Mr. Engel: I am sorry, could I——sorry. Could I get the last answer before he started that?

[291] The Court: Yes, the last answer was that this agreement is not an agreement that involves any railroad.

Mr. Corrigan: Q. Now take your time and read sub (d).

A. "Only direct representatives of the employer may give orders to employees covered by this agreement."

Q. The employer being the Pacific Motor Trucking Company?

A. That's correct, sir.

Q. Now, was this an agreement that was negotiated between the Teamsters Union and the representatives of the Pacific Motor Trucking Company and other carriers?

A. And other carrier. The California Truck Owners Association is our bargaining agency.

Q. Now read sub (e).

A. "Sub (e). In the loading and unloading of trailers from rail cars, there shall be at least two men in the crew at all times."

[304] Mr. Corrigan: Q. Now, when vans, say at the piggyback ramp in San Francisco in 1963, are put on the flatcars or taken off, is that with aid of a tractor?

A. Yes, sir.

Q. And are those tractors special in any way, specifically designed to suit those needs?

A. They are.

Q. And who's the owner of those tractors?

A. P.M.T. Company.

Q. Now, when did this whole piggyback business start, about what year?

A. Around 1950.

Q. And at that time was the Pacific Motor Trucking Company in the automobile carriage business?

A. Yes, sir.

Q. Did they at that time have employees trained to move automobiles?

A. Yes, sir.

Q. To place automobiles on carriages?

A. Yes, sir.

[307] The Court: All right, let me ask this. P.M.T. had been in business for many years?

The Witness. Yes, sir.

The Court: Tri-levels didn't come along until 1950, is that right?

The Witness: No, tri-levels came along in the early Sixties, sir.

The Court: Early Sixties?

The Witness: Or mid-Sixties.

The Court: All right, mid-Sixties. Starting in 1950 you were making multiple deliveries by multiple deck trailers, is that right?

The Witness: 1937, sir.

The Court: That's when that started?

The Witness: Yes, sir.

The Court: And P.M.T. was engaged in that practice ever since?

The Witness: Yes, sir.

[308] The Court: And it had been with knowledge of the method of loading and unloading these types of carriers?

The Witness: Yes, sir.

The Court: All right.

Mr. Corrigan: Q. Now, did you have a force of men who would unload these highway auto carriers that were carried on railroad cars before the tri-level?

A. Yes, we did.

Q. Now, when the tri-levels came along, was that force used to unload tri-levels?

A. For the most part.

Q. And did you develop equipment to unload tri-levels?

A. Yes, we had to, sir.

Q. And did your company enter into a contract with the Southern Pacific for the unloading of piggybacks and tri-levels when they developed?

A. Yes, we did.

Q. And after this contract was signed, did you continue to utilize this force that you have previously had to unload and move the highway auto carriers?

A. Yes, we did.

[309] A. On a unit basis, I believe that's it, yes.

Q. In other words, is it so much an automobile?

A. So much an automobile.

Q. Piecework basis?

A. That's what it amounts to.

The Court: Well now, let me find out something.

Mr. Corrigan: Yes, sir.

The Court: You are paid on a piece basis for the number of cars unloaded?

The Witness: Yes, sir.

The Court: Well, who subsequently delivers these cars to the ultimate destination?

The Witness: We do, sir.

The Court: And how are you compensated for that?

The Witness: By the tariff in that respect. And now we are getting into an area that I am not totally familiar with, sir.

The Court: All right, but just so that I understand, you may correct me, you are telling me that the company is paid on a piece basis for unloading and it's paid an additional tariff for delivery?

The Witness: Yes, sir.

[311] Mr. Corrigan: Q. Now, did you also, at the time Mr. Kelley was hurt and prior to when he was hurt, utilize [312] men, including Mr. Eugene Kelley, for drive-away delivery to dealerships, automobile dealerships?

A. We did this for some time, yes sir.

Q. All right, and by drive-away—explain to the Court what I am talking about.

A. Well, individual automobiles would be driven to a dealership.

[314] The Court: Oh, I think the quickest way to do it is to get back to 1963.

Mr. Corrigan: All right.

The Court: At the San Francisco yard, the scene of this accident. Do you know whether any companies other than P.M.T. did the unloading?

The Witness: In San Francisco?

The Court: Yes.

The Witness: No.

The Court: They did not? All right. Now, do you know whether any other companies made car deliveries?

The Witness: Yes, sir.

The Court: All right. Now we get back to the question of charging that I have before me.

Mr. Engel: Your Honor, if I may, the question meaning: Made deliveries from that yard?

The Court: Yes, from that yard, automobile deliveries from that yard—any other truckers. If you know.

The Witness: Yes, I'm quite sure of this.

The Court: All right, now, do you know whether the unit charge of unloading those trucks was a unit charge made by the—unloading was out of it? Unit charge made by P.M.T. and a delivery charge a separate charge made by the **[315]** other?

The Witness: By an outside carrier?

The Court: Yes.

The Witness: We were compensated for our unloading of the automobiles and grounding them.

The Court: Yes.

The Witness: And then they become someone else's responsibility to take them to destination.

The Court: All right.

[322] Mr. Corrigan: I understand. All right, let me . . . . I have here a certified . . . . You may have the same ruling with reference to this. I have here a certified file from the Workmen's Compensation Appeals Board which has been certified by that body as being their file, and it includes signed statements and applications by Mr. Kelly himself.

I would like to offer this entire document in evidence on the limited question of——

The Court: What does he say?

Mr. Corrigan: He said he was an employee at the P.M.T. when he filed with the Workmen's Compensation Appeals Board, as did his attorney.

Mr. Engel: Your Honor, I can——

The Court: Well, that much is material.

Mr. Engel: All right, could we also have that marked for identification, Your Honor? There are cases that I believe hold that the determination, if

there is a determination, or the application, or the IEC proceedings, are not controlling in any case with regard to the issue that's before this Court.

[323] Mr. Engel: I was going to suggest that Mr. Kelley is in all likelihood going to be on the stand. That question could be asked him, whether he did in fact, you know, make such an application.

The Court: Or even if he denied it, I would have to admit it in evidence.

Mr. Engel: I mean, if he admitted this, this would just be redundant, Your Honor, and then it would avoid any question of admissibility.

The Court: Oh.

Mr. Engel: And I will stipulate that he filed such a thing with the IEC.

The Court: I will permit the application in evidence. The rest of it should remain marked for identification.

[330] Q. Now, we've talked about a booklet, one is marked Defendant's K, and the other is marked Plaintiff's Number 10. You are familiar with this booklet?

A. Yes, sir.

Q. Are you also familiar with a blue booklet that's used by people down at the piggy-back ramp that contains diagrams with regard to hooking and unhooking automobiles?

A. Are you referring to the annual release from General Motors?

Q. I am not sure. Are you familiar with a blue book that contains diagrams?

A. There is a blue book. There are other color books too, sir.

Q. And are you familiar with the fact that Mr. [331] Jarvis has taken this down to the piggy-back area and participated with a crew of people down there in demonstrating and instructing on how to hook and unhook automobiles with that diagram book?

A. I wasn't there, so I don't know, sir.

Q. Well, are you aware of that?

A. Yes, I will have to say I was aware of it.

[337] Mr. Engel: Q. Let me ask you this. Do you have any knowledge of Pacific Motor Trucking Company ever running a railroad?

A. No sir.

Q. And do you have any knowledge as to whether Pacific Motor Trucking Company has a license to run a railroad?

A. I am sure we don't.

Q. All right. Do you have any knowledge whether Pacific Motor Trucking Company has a license to operate over the highways by motor vehicle?

[338] A. Yes. Yes sir, we do.

Q. And that is a license from the IEC?

A. No sir, it's not a license, it's an authority granted by the IEC.

Q. All right. And pursuant to that authority that is given you to operate trucks over inter-state highways, certain rates are set as to what you can charge?

A. Yes.

The Court: So that when you said that P.M.T. has shipped by rail, you are saying in the same sense that I might ship my furniture by rail?

The Witness: Yes sir.

Mr. Engel: Q. And yesterday, Mr. Calkins, when you referred to a tariff, that is the rate that the IEC authorizes you to charge, isn't that correct, as far as you know?

A. Not necessarily the IEC, but a regulatory agency of some nature.

Q. All right. And—

The Court: You mean, in other words, it's a rate that either the IEC or the California Public Utilities Commission, or somebody like that, authorizes you to charge?

The Witness: Yes sir.

The Court: Absent any tariff, you are given discretion?

[340] Q. I will rephrase that, then. There has always been a contract, though, between P.M.T. and S.P.—strike that.

There has never been a time since you first contracted with Southern Pacific Company that you have not had a contract with Southern Pacific Company to unload automobiles, isn't that a correct statement?

A. I believe that is a proper statement.

[342] "Q. And who it that?

"A. Mr. Charles Myrick.

"Q. How long has he been in the office?

"A. Well, in my office he's been there six years, I guess. Seven years, perhaps."

I might note this was taken February 21, 1968.

"Q. In the Safety Department?

"A. Yes, as a driver trainer.

"Q. He is a driver trainer now?

"A. Yes sir.

"Q. And what kind of drivers?

"A. I beg your pardon?

"Q. What kind of drivers does he work with?

"A. All kinds of drivers. We have over 4,000 people working for us.

"Q. I mean, are these drivers that drive trucks?

"A. Yes sir.

"Q. Does he work with drivers who remove cars from tri-level auto carriers?

"A. No sir, because they aren't drivers.

[343] "Q. Okay, that is what I am trying to clarify. What are the names of the other three that work in your office?

"A. My chief clerk is Rosemarie Klikhammer (phonetic spelling), Nancy Conroy and Jean Molino.

"Q. How long has Mr. Molino worked in the office?

"A. They are all females, they are all ladies. Jean Molino.

"Q. Do you have anybody that works with P.M.T. that works with the drivers or the individuals who drive automobiles off the tri-level auto carriers?

"A. Do we have anyone?

"Q. In the Safety Department?

"A. No sir.

"Q. Is there anybody in the Safety Department that works with the individuals who unload automobiles from tri-level auto carriers for purposes of safety?

"A. No sir."

[344] The Court: All right.

Mr. Engel: Q. Now, yesterday—

The Witness: May I qualify it, sir?

The Court: Yes, you may.

The Witness: I will qualify it in that I have only a staff relationship to accident prevention in our company. It's a line responsibility, so I primarily work with supervisors.

The Court: But as far as you know, Mr. Myrick has not supervised the unloading of automobiles?

The Witness: As far as I know, yes sir.

The Court: And as far as you know, you don't know of any specific instructions he has ever given on that score?

The Witness: No sir, I do not.

The Court: All right.

Mr. Engel: Q. Now, you used the term "grounded" yesterday. Do you remember using the term "grounded?"

A. Grounded?

Q. Talking about unloading automobiles. You said something about after they are grounded.

A. Oh, yes. We remove them and put them on the ground. We call it that.

Q. Okay. Now, have you, sir, since May 25, 1961, ever at any time, up to the present time, ever been advised by Mr. Nugent, who you described as the Chief of the Safety [345] Department of Southern Pacific Company—right?

A. Superintendent.

Q. Superintendent. Have you ever been apprised of any communication that he has issued with regard to safety of P.M.T. forces and particularly with regard to safety railings?

A. Yes sir.

Q. And can you tell me what they are?

A. A safety rail?

Q. No, no, what directives or memorandum, or whatever it is, have you been apprised of that came from Mr. Nugent?

A. Mr. Nugent has been retired for six years. I am trying to remember. During the period when tri-level and bi-level operations and piggy-back generally was starting, there was a great deal of direct relationship between the Southern Pacific and P.M.T. for mechanical reasons, for experimental reasons and for instructional reasons.

Because this was a period when this was somewhat new, and all concerned were feeling our way.

Q. All right, and this is when you received communications from Mr. Nugent?

A. That would be during this period, I'm quite sure. Mr. Nugent has been gone for at least six years, I think.

[349] A. Yes, sir.

Q. And that says "P.M.T." after his name?

A. That's correct.

Q. And the Nugent that we talked about is this Mr. M. A. Nugent here?

A. Yes sir.

Q. It's a name, or it appears that he sent this letter out?

A. Yes.

Mr. Engel: May this be marked, then, in evidence, Your Honor, as Plaintiff's next in order?

The Court: The letter from Nugent to Johnson?

Mr. Engel: Yes, Your Honor.

The Court: All right.

Mr. Engel: No, it's a letter from Nugent to Jekyl with a copy to go to Johnson.

The Court: All right.

Mr. Engel: And in particular, on the last page there are instructions with regard to how to operate these tri-levels and the safety procedures to P.M.T. employees and Car Department employees of Southrn Pacific Company, and whose responsibility it is to raise and lower safety railings. I might add that letter is 1961.

The Court: All right, it will be received.

[350] The Clerk: Plaintiff's Exhibit 12 admitted in evidence.

[Letter marked Plaintiff's Exhibit Number 12 received in evidence.]

Mr. Engel: Q. Mr. Calkins, are you familiar with the American Association of Railroads?

A. I am aware of them, yes, sir.

Q. AAR?

A. Yes sir.

Q. They are a regulatory body, are they?

A. No sir.

Q. What are they?

A. They are an association of railroads.

Q. All right. And does P.M.T. belong to the AAR?

A. No sir, not to my knowledge.

Mr. Engel: Q. Mr. Calkins, do I understand your testimony that you have never dealt with Mr. Nugent?

A. I beg your pardon?

Q. Do I understand your testimony to be that you have never dealt with Mr. Nugent?

A. Never dealt with Mr. Nugent?

[351] Q. You corresponded with him?

A. No, I never said that. I may have corresponded with him over the years, yes. It's possible.

Q. All right. Do you recall discussing Rule 826 with him by correspondence?

A. Don't even know what Rule 826 is, sir.

Q. Okay, can you identify this document, please, for me?

A. Yes, I can identify it. To begin with, Rule 826 is not applicable to an outside company such as P.M.T. It's a railroad designation and it has absolutely nothing to do, other than the fact that anyone using a siding, a team track or a facility such as the piggy-back ramp, for its own protection had better flag the string that they are working on.

Because if they made a switch, it could be quite disastrous.

Q. All right, can you identify the document for me, please?

A. Yes sir, I can.

Q. That's a letter to you?

A. Yes sir.

Q. And it's from Mr. Nugent?

A. Yes sir.

Q. And what was the date of it?

[352] A. June 13, 1961.

Mr. Engel: May I have that marked as Plaintiff's next in order, please?

The Court: Very well.

Mr. Engel: Q. Mr. Nugent at that time, what was his position, again?

A. I believe it was Superintendent of Safety, Southern Pacific Company, sir.

Q. And what was your job in 1961?

A. Manager of Safety and Personnel.

The Clerk: Plaintiff's Exhibit—

A. (continuing)—Pacific Motor Trucking Company.

The Clerk: Plaintiff's Exhibit 13 marked for identification.

[Letter marked Plaintiff's Exhibit Number 13 for identification.]

Mr. Engel: Q. Now, do you know who a Mr. A. S. McCann is?

A. Yes, I know the man. I think at that time he was Superintendent of one of the railroad divisions, back in '63. I am almost sure.

Q. In '61 you think that was his job also?

A. That could have been, sir. I don't remember.

Q. Do you know who a Mr. McIntrey, I guess is would be M-c-I-n-t-r-e-y— do you know who that is?

[353] A. No sir.

Q. Mr. A. McIntrey?

A. The name is not familiar to me. McIntrey?

Q. How about the initials B.V.M.?

A. B.V.M.? I don't know.

Q. Showing you this next document, do you recognize any of the initials that are stamped on that document?

A. M.A.N., O.J.P. Those must be people in the Southern Pacific Company. B.V.M. What did I say?

Mr. Engel: Let me have it marked next in order as Plaintiff's Exhibit.

A. (continuing) None of those people are familiar to me—those initials.

Q. Other than Mr. McCann that you identified?

A. Yes, Mr. McCann.

Q. And that is, I should add—that's who this document appears to be directed to, Mr. A. S. McCann.

A. Yes sir.

Q. And it's dated June 15, 1961?

A. Yes sir.

Mr. Engel: May I have that document marked as Plaintiff's next in order, Your Honor?

The Court: All right.

The Clerk: Plaintiff's Exhibit 14 marked for identification.

[354] [Document marked Plaintiff's Exhibit Number 14 for identification.]

Mr. Engel: Q. Now, it's your understanding, Mr. Calkins, that Rule 826 is a railroad rule, is that correct?

A. Yes sir.

Q. How about Rule 26?

A. No idea what Rule 26 is, sir.

Mr. Engel: Okay.

[Colloquy among counsel out of hearing of the reporter.]

Mr. Engel: Q. Showing you this next document, Mr. Calkins, recognizing, of course, that the red marks on it were put on there by me, and calling your attention to the bottom down here, does that appear to be a copy of a letter that you received in July, 1961?

A. Yes.

Q. All right. And the date on that . . . Your initials appear down at the "copy?"

A. C. D. Calkins, McCann, Green, Herzog. Who's that?

Q. Well, let me ask you some questions.

A. All right.

Q. That document is dated July 28, 1961?

A. Yes sir.

Mr. Engel: May we have that marked as Plaintiff's **[355]** next in order, Your Honor?

The Court: It will be so marked. Exhibit 14, is it?

The Clerk: Fifteen. Plaintiff's Exhibit 15 marked for identification.

[Letter marked Plaintiff's Exhibit Number 15 for identification.]

Mr. Engel: Q. And this is a letter directed to Mr. Jekyl from Mr. Nugent, is that correct?

A. Yes sir.

Mr. Engel: Your Honor, again, that document has red lines that I put on there.

The Court: All right.

Mr. Engel: Your Honor, if I may, before the Court reads it, maybe I could ask him some questions as to the names that are on there and then—

The Court: Certainly.

Mr. Engel: Q. Do you know who Mr. Healy is?

A. Yes sir, he was a Safety Supervisor for the Southern Pacific Company.

Q. And do you know who this gentleman is? It appears to be—who was that Hume?

A. Hume was the head of our Claims Department at that time.

Q. All right, and—

[356] A. 1961.

Q. And that's his name just above yours at the bottom of the letter, is that correct?

A. Hume, yes.

Q. Now, Mr. McCann—his name appears underneath yours, is that right?

A. Yes, it does.

Q. And who was he with at that time?

A. I believe he was Superintendent of the Western Division at that time.

Q. Of what?

A. Southern Pacific Company.

Q. Okay.

A. The last name, Herzog, is also a Southern Pacific Safety Supervisor.

Q. Now, did I ask you if you knew who a Mr. M. A. McIntyre is?

A. You did, sir.

Q. And did you know? I have forgotten now.

A. At that time—well, he was an Operating Officer of the Southern Pacific Company in some capacity. What it was, I don't know.

Q. All right.

A. At this time.

[Continued on next page.]

[357] Q. And showing you this next document, doesn't that purport to be a letter dated July 30, 1961, from Mr. McCann, who you have identified as somebody for Southern Pacific, directed to Mr. McIntyre, whom you identified as somebody from Southern Pacific Company? Is that correct?

A. M-hm.

Q. You have to say it audibly.

A. Yes, sir.

Mr. Engel: May I have that marked as—one moment, Your Honor.

The Court: All right, it will be marked.

Mr. Engel: Q. Could I ask if you knew somebody with the initials O. J. P.?

A. I don't think you did.

Q. Do you know who it is?

A. O. J. P.?

Q. Right.

A. Sorry, I don't know.

[358] Q. I note that in the year 1963 it indicates that Pacific Motor Trucking Company did 42 percent of its business with the Southern Pacific Company. Now, are there other companies with which the Pacific Motor Trucking Company did business in 1963, and still does?

A. Yes, sir.

Q. And were these other companies with which the [359] Pacific Motor Trucking Company did business common carriers like Southern Pacific Company?

A. Many of them were.

[364] Mr. Engel: "Q. These are just spot inspections?

"A. Yes.

"Q. And when you inspect, what do you do? What are you inspecting?

"A. We inspect for proper loading procedures on inbound shipments to see if there is anything that loading operation may have caused damage to a vehicle where it had been improperly loaded. We just generally on the unloading points supervise their—inspect their operation to see that the unloaders are not doing anything that might be a [365] hazard for damage to automobiles."

Mr. Engel: Q. Is that correct as a statement?

A. I am not doing too much of that any longer, but I was at the time I made the deposition, yes, sir.

Q. All right, and . . . Now, you had occasion to draft a manual with regard to tri-levels, is that correct?

A. Yes, sir.

Q. And you printed up a thousand copies of that and distributed it to P.M.T.?

A. P.M.T. and other people, other unloaders and loaders.

Q. All right. And this manual was for the man who actually got on the tri-level and did the unloading, is that correct?

A. Yes, sir, it was designed for new employees.

Q. Now, with regard to the damage to automobiles caused in the unloading process, isn't it correct that Southern Pacific Company stands the cost of that damage?

A. Yes, sir.

Q. And damage on a highway, meaning not to the rail car, is paid by P.M.T.?

A. As I understand it, yes, sir.

[367] A. In the period of time between 1962 and 1964, I would go out there to check the terminal operations.

Q. What capacity?

A. As assistant supervisor.

Q. All right. Assistant supervisor in the present department?

A. Specialized operations department at that time, yes, sir.

Q. Okay.

A. Subsequent to that time, I was out there checking the unloading operations of automobiles and—

The Court: Did you ever check unloading operations of automobiles prior to—what is it, 1964?

The Witness: No, sir.

Mr. Engel: Q. Now, prior to your going out there and checking the unloading of automobiles, did anybody in your department do that?

A. Two or three others.

Q. Assistant supervisors?

A. Assistant supervisors, in addition to their other assignments, would periodically check automobiles.

Q. And what were their names?

A. Well, there was the man that introduced me to automobile unloading. His name was R. R. Allice, A-l-l-i-c-e. I believe he was preceded by E. J. Schnabel. And probably [368] prior to Mr. Schnabel was Dick Schriber. And Harold Comstock, deceased, used to check automobiles.

Q. All right. And these are all employees of who?

A. Specialized operations department, Southern Pacific Company.

Q. All right. Now, when you have had occasion to go out there to this area yourself, did the individuals that you worked with—you worked with the P.M.T. people that are out there?

A. Now, 1964 on, when we were checking the unloading, or——?

Q. Well, when you went out there for the unloading, then, you worked with the P.M.T. people?

A. I observed them and I talked to their supervisor.

Q. All right. And before that, did you have occasion to work with P.M.T. people out there then?

A. No, not prior to 1964.

Q. All right. Well, again I call your attention, I am going to read some questions and answers in your deposition, Page 30, Line 10, to Page 31, Line 11.

Mr. Corrigan: Thank you.

Mr. Engel: "Q. Now, when you go to the fourth and Channel Street piggyback area, or have in the past, either as an assistant supervisor or a supervisor, do you have any verbal contact with the men themselves who work on the tri-level [369] cars?

"A. Yes.

"Q. And in what way? In other words, what do you do with them?

"A. Well, on loading of vehicles at Fourth and Channel, foreign vehicles, we have to devise a method of adopting——"

Mr. Corrigan: Pardon me, Mr. Engel. I am sorry to interrupt you, but could you start reading the answer on Line 16 over? The "on loading" and "unloading" run together. Could you read that, please?

Mr. Engel: All right. Well, I will read it over.

"A. Well, on loading of vehicles at Fourth and Channel Street, foreign vehicles, we have to devise a method of adapting the tie-downs on our rail cars to handle foreign automobiles in order that we can carry them by rail without damaging these cars. So we go out and we test load various types of foreign cars and experiment with tie-downs on the vehicles. And we have to have the assistance of the P.M.T. employees to make the various adjustments and tie-downs on the cars for test purposes. So we discuss with them, get underneath the vehicles, or find where on the vehicles we can secure chains, and then make a [370] schematic drawing of the tie-down. They will load the car. We will send a wire to the destination and ask that carrier to make an out-check to see if there was any damage as a result of the tie-downs.

"Q. Now, when you do this, are you in effect showing them where to hook it and so forth?

"A. Correct.

"Q. And this is direct with the men who are actually doing it?

"A. Correct.

"Q. And they follow your instructions in this regard?

"A. They offer advice, too.

"Q. But they also follow your instructions?

"A. Yes. It's a mutual thing. We try to devise the best location."

[375] "Q. Are there any, or were there any, or have there ever been any members of P.M.T. who are part of the specialized operations department?

"A. Yes, the whole TFC, Trailer Flatcar Department, which is now in the Transportation Department, at one time was in the Specialized Operations Department, and the P.M.T. Dispatching Office was located in this department. It still is located in this department but it's now in the Transportation Department.

"Q. Now, the Trailer Flatcar Department is P.M.T.?

"A. No, it is Transportation Department. But the P.M.T. Dispatching Office is located as a bureau of this department.

[376] "Q. A bureau of the Transportation Department?

"A. Right.

"Q. How many bureaus are we talking about in the Transportation Department, roughly?

"A. I don't know.

"Q. I mean is it two or several?

"A. Several.

"Q. Are any of the other departments or bureaus P.M.T., other than the one flatcar?

"A. This is the only one I know.

"Q. The other departments are what? Just som of them, for example?

"A. Accounting, Engineering, Mechanical, Law. I don't know of any P.M.T. people being in those departments.

"Q. Who are in those departments?

"A. The employees of those departments.

"Q. Southern Pacific?

"A. Southern Pacific.

"Q. And who heads up the Transportation Department, do you know?

"A. Yes, the General Superintendent of Transportation.

"Q. Do you know who that is?

"A. Mr. J. J. Willis.

[377] "Q. W-i-l-l-i-s?

"A. Right.

"Q. Now, he is the top man in the Transportation Department?

"A. That's right.

"Q. And under his supervision are the various bureaus of the Transportation Department?

"A. Correct.

"Q. And one of those bureaus is P.M.T. Dispatching or something?

"A. In the TFC section.

"Q. Of?

"A. Transportation Department.

"Q. Is it P.M.T., the whole P.M.T., or part of P.M.T.?

"A. Just their dispatchers. The trailer flatcar service is in the Transportation Department. To coordinate activities with P.M.T. They moved their dispatchers in and made a bureau or sub-bureau, if you want to call it, of the TFC section.

"Q. Now, when did this take place, do you know roughly?

"A. Before I was in the department.

"Q. So that would be before when?

"A. I came into the specialized operations [378] department in 1962.

"Q. So it was before that?

"A. Yes.

"Q. And this P.M.T. group is still a bureau within this department?

"A. Yes."

[402] Now, have you ever heard of Convoy Company before?

A. Yes, sir.

Q. And this Convoy Company, is it a trucking company?

A. Yes, sir.

Q. Is it a trucking company separate and distinct from Pacific Motor Trucking Company?

A. Yes, sir.

Q. Is it a subsidiary of Southern Pacific Company?

A. No, sir.

Q. Does this Convoy Company unload tri-levels like Southern Pacific?

A. It unloads tri-levels in Oregon for the Southern Pacific Company.

Q. I meant, my prior question was, what I wanted to say is, does it unload tri-level like Pacific Motor Trucking Company does?

[403] A. That's correct.

[406] Mr. Engel: Your Honor, at this time I would like to read into the record some interrogatories.

The Court: All right.

Mr. Engel: Your Honor, I'm going to, I think this would make it more clear. If the Court feels it wouldn't, then I will do it the other way. But what I am going to do is, I am going to skip from various sets of interrogatories to try and tie them into various ideas, as opposed to tying them to various sets of interrogatories.

The Court: Any objection?

Mr. Corrigan: No sir, as long as he identifies them.

The Court: All right, go right ahead.

Mr. Engel: Now, with regard to the answers submitted [407] December 20, 1967, that's the date on the answers, and these are interrogatory answers filed by defendant Southern Pacific Company.

Question Number 1: Is Pacific Motor Trucking Company a corporation, and if so, please state the following: (a) In what year was it incorporated? (b) In what State was it incorporated? (c) Where is its principal place of business at the present time?

Answer Number 1: 1933; California. There is no answer to the (c) part.

Question and Answer Number 3: Has Pacific Motor Trucking Company ever been a wholly owned subsidiary of defendant Southern Pacific Company, and if so, please state the following: On what date did Pacific Motor Trucking Company become a wholly owned subsidiary of Southern Pacific? (b) Please set forth the dates during which period of time Pacific Trucking Company was a wholly owned subsidiary of Defendant Southern Pacific Company, up to and including the present date?

The answer is: On August 2, 1933, Pacific Motor Trucking Company became a wholly owned subsidiary of Pacific Motor Transport Company, which **[408]** in turn was a wholly owned subsidiary of Southern Pacific Company. On April 10, 1937, Pacific Motor Trucking Company became a wholly owned subsidiary of Southern Pacific Company as a result of the purchase by Southern Pacific Company from Pacific Motor Transport Company of all of the stock of Pacific Motor Trucking Company.

(b) Indirectly from August 2, 1933, to April 10, 1937, and directly from April 10, 1937, to the present date.

Number 5 Please set forth the name, address and employer of all members of the Board of Directors of Pacific Motor Trucking Company.

Answer: R. K. Booth, Vice President and Controller Pacific Motor Trucking Company, 9 Main Street, San Francisco, California. L. E. Hoyt, Vice President, Southern Pacific Company, 65 Market Street, San Francisco, California. B. R. Johnson, President, Pacific Motor Trucking Company, 9 Main Street, San Francisco, California. D. K. McNear, Vice President, Southern Pacific Company, 65 Market Street, San Francisco, California.

Question and Answer Number 6: What percentage of the capital stock of Pacific Motor Trucking **[409]** Company was owned by defendant Southern Pacific Company on July 3, 1963?

Answer: 100 percent.

Number 8: For each year since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of Pacific Motor Trucking Company's gross income which resulted from business done with defendant Southern Pacific Company.

Your Honor, I don't know how you care about——

The Court: I have gone over all these.

Mr. Engel: Okay. I won't read the answer in, but maybe I can by stipulation—that answer can be considered in evidence?

Mr. Corrigan: Yes, so stipulated.

Mr. Engel: All right.

The Court: It may be stipulated that all the answers given to the interrogatories are in evidence. No?

Mr. Engel: I am just trying to offer certain ones, Your Honor.

Mr. Corrigan: I will stipulate the whole thing can go in.

Mr. Engel: Number 13: Has there been at any time since the date of incorporation of Pacific

Motor Trucking Company a director of officer [410] of defendant Southern Pacific Company who was at the same time a director or officer of Pacific Motor Trucking Company?

Answer: Yes.

And then, Your Honor, I would like to offer into evidence Question Number 14 and its answers. It's very lengthy.

Mr. Corrigan: I will agree it may go in.

The Court: All right.

Mr. Engel: Number 20: Are any monies, proceeds or financial assistance of defendant Southern Pacific Company used for the purpose of financing the operation of Pacific Motor Trucking Company? If your answer is in the affirmative, what percentage of Pacific Motor Trucking Company's operational costs are derived from Southern Pacific Company's monies, proceeds or financial assistance?

Answer: From time to time Southern Pacific Company has furnished funds to Pacific Motor Trucking Company for operational purposes. As of August 31, 1967, no such funds were being furnished therefore, percentage of Pacific Motor Trucking Company's operational costs derived from Southern Pacific Company's monies was zero percent. [411] That's as of the date of these answers.

21: Since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of the total capital stock of Pacific Motor Trucking Company which was owned by

defendant Southern Pacific Company for each year from the date of incorporation of Pacific Motor Trucking Company up to January 1, 1966.

Answer: 100 percent, directly or indirectly.

22. What was the dollar value of the capital stock of Pacific Motor Trucking Company each year from 1961 through 1966?

Answer: For each year it is the same, 350,000 shares, $50 par value, $11,375,000.

Number 35: On the date this accident occurred, was there in effect a policy of insurance by or through which Pacific Motor Trucking Company was insured in any manner or to any extent, whether primarily or excess, with regard to any claim, cause of action, injuries or damages alleged or claimed against Pacific Motor Trucking Company? If so, the number of said policy or policies of insurance, the name of company or companies issuing said policies, the name or names of the insureds and (d), the limits of liability as to [412] each policy.

The answer is: Yes. And there are two policies with the numbers set forth, SPF 9577 and SPF 842. Lloyds, an English company, and the other is Transportation Mutual Insurance Company. As to both policies the insured is Southern Pacific Company and/or subsidiary companies, and (d) the policy limits are set forth.

Now, then, moving into the same set of answers, Your Honor, but going back now to Number 16:

Does Pacific Motor Trucking Company own any railroad track or real property upon which railroad track is located?

Answer: No.

Number 19: With regard to the tri-level auto carrier car identified as SF510511, please set forth the following information as it existed on July 3, 1963, at approximately 1:30 P.M.: (a) The name and address and employer of the person or persons or business entity who manufactured said tri-level auto carrier.

Answer: Southern Pacific Equipment Company, 65 Market Street, San Francisco, California.

Number 25: With regard to the area surrounding tri-level auto carrier car identified SP510511, **[413]** on the date of July 3, 1963, at approximately 1:30 P.M., please set forth the following information: (a) The name, address and employer of the person or persons who owned the real property in said area; (b) the name, address and employer of the person or persons who were in possessory control of said real property.

Answer: Southern Pacific Company; Southern Pacific Company, 65 Market Street, San Francisco, California.

Number 28: Does Pacific Motor Trucking Company own, possess or control any real property over which must be traveled in order to get to the site where plaintiff, Eugene Kelley, was injured on July 3, 1963, when he fell from a tri-level auto carrier car identified as SP510511?

Answer: No.

Then Number 33: Set forth the name and address of all railroad companies which Pacific

Motor Trucking Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, during the period between June 1, '63 and August 1, 1963.

[414] Answer: Southern Pacific Company.

Number 34: Set forth the name and address of all companies which defendant Southern Pacific Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, between the dates of June 1, 1963, and August 1, 1963.

Answer: Pacific Motor Trucking Company.

Number 40: During the period between June 1, 1963, and August 1, 1963, did defendant Southern Pacific Company have any contractual agreements with Pacific Motor Trucking Company relative to responsibility of either defendant Southern Pacific Company or Pacific Motor Trucking Company for damage done to automobiles that were being transported by Southern Pacific Company and that were being unloaded by Pacific Motor Trucking Company?

Answer: No.

42: With regard to responsibility for damage done to automobiles being unloaded from tri-level automobile carrier cars, has defendant Southern Pacific Company made any claims of any nature against Pacific Motor Trucking Company **[415]** relative to Pacific Motor Trucking Company's

responsibility for payment of or compensation for damage done to said automobiles?

Answer: No.

And if we can go to the interrogatories of September 16, 1968, the answers of that date?

Number 1: In the deposition of Mr. Roy Hedland on September 6, 1967, Mr. Hedland stated that the rate charged by Southern Pacific Company in certain instances included the charge involved of setting the automobile off of a tri-level auto carrier on to the abutting ground. Mr. Hedland further stated that whether these charges are included or not depends on a point of origin and the point of destination. With regard to Mr. Hedland's testimony, please set forth the following: What points of origin and what points of destination give rise to a charge made by defendant Southern Pacific Company for removing automobiles from tri-level auto carriers as of July 5, 1963?

Answer: Contrary to Mr. Hedland's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles without **[416]** regard to the origin of the particular shipment.

And—let's see. Referring to the same set of interrogatories, answered September 16, 1968,

Number 5: On July 3, 1963, did Pacific Motor Trucking Company own, rent or lease any equipment used by personnel in the unloading of automobiles from tri-level auto carriers at Fourth and Channel Streets?

Answer: No.

Then going over to October 18, 1968, answers.

The Court: Will you give me that one again? Read that last one.

Mr. Engel: On July 3, 1963, did Pacific Motor Trucking Company own, rent or lease any equipment used by personnel in the unloading of automobiles from tri-level auto carriers at Fourth and Channel Streets?

The Answer is: No.

[424] A. July 3, 1963.

Q. And where did it occur?

A. At the piggy-back ramp, San Francisco.

Q. At what time?

A. Approximately between 1:30 and 2:30.

Q. You were working at the time?

A. Yes, I was.

Q. And what were you doing?

A. Unhooking automobiles on a tri-level.

Q. Okay. When you say a tri-level, what is a tri-level?

A. It's a triple decker car that hauls automobiles on the railroad tracks.

Q. Showing you Plaintiff's Number 1, can you tell me what that is a picture of?

A. That's a tri-level.

Q. All right. And that's the type of railroad car you were working on at the time?

A. Yes.

Q. And when the accident occurred, whereabouts on the tri-level were you?

A. I was on the top deck.

Q. And was this railroad car on railroad tracks at the time?

A. Yes, it was.

[425] Q. Were you with anybody?

A. Yes, three other fellows I worked with.

Q. Can you tell me what their names are?

A. John Grimaddo and Connie Oosterbaan and George Pryal.

Q. Now, how long had you been doing this work on this—or this tri-level work, let's say, on this particular day before the accident occurred?

A. We started right after lunch.

Q. All right. Sorry, I didn't hear that.

A. I am not positive. I think we started right after lunch.

Q. All right, and what time was lunch hour?

A. 12:00 to 1:00.

Q. So sometime after 1:00 o'clock, you began work on the tri-levels?

A. That's right.

Q. Now, earlier that lay you had been at work?

A. Yes.

Q. What were you doing?

A. Unloading the piggy-back service.

Q. Now, can you tell us specifically the job that was yours with regard to the tri-level? What were you supposed to do?

A. The day I got hurt?

[426] Q. Well, at the time you got hurt, right.

A. I was unhooking the hooks in the chain from the automobiles.

Q. All right. How long had you been working at this location?

A. I think it was from '60 when I went back on the piggy-back.

Q. When you what?

A. 1960 I went back on the piggy-back.

Q. All right. You had—well, had you been at the piggy-back and then gone away and then come back in '60?

A. Yes.

Q. All right. And how long had you been away from the piggy-back when you came back in '60?

A. Oh, two years, I guess.

[427] Q. I am sorry?

A. Two years, I believe.

Q. And then how long had you been at the piggy-back before that?

A. 'Til '55, when I went on the piggy-back, and I worked several years and then I went on the mail for almost two years, I think it was, and then I went back to the piggy-back.

Q. All right. So between, say, '58 and '60, you worked the mail?

A. Yes.

Q. And then from '55 to '58 you worked piggy-back?

A. Right.

[434] The Court: Well, somebody raised the railing there?

The Witness: Right.

The Court: On each job. Well, who did that work?

The Witness: Anybody could do it.

The Court: Well, the members of your crew did it? Did you ever see the carmen do it before you started the job?

The Witness: No, I can't say I did.

The Court: So that when you say anyone, you mean anyone, for instance, such as the four of you that were working there on the third of July?

The Witness: Right.

The Court: But you never have seen a carman do it while you were working there?

The Witness: I have seen them raise them to check them.

The Court: To check them and test them?

The Witness: Yes, I know that.

The Court: Did you ever see them raise any in preparation for unloading?

The Witness: No, I can't say I did.

[435] The Court: All right, go ahead.

Mr. Engel: Q. Now, when you say that there may be a crew over at the tri-level, your job was usually with the piggyback, you said?

A. That's right.

Q. And that's distinct, a distinct assignment, anyway, from the tri-level?

A. Right. They had a bid that four other guys bid on tri-level work, and we had seniority, so we worked piggyback. If we got through unloading piggyback, then we would go over and help them drive them off or untie them, whatever we could do to help.

Q. All right. So in other words, you had seniority, so you bid for the piggyback as opposed to the tri-level?

A. That's right.

[438] Mr. Engel: Q. Now, do you know a fellow named Dick Schriber?

A. Yes.

Q. And have you ever seen him out in that area?

A. Yes, I have, a lot of times.

Q. Have you seen him give any orders or directions to piggyback personnel out there?

A. Yes.

Q. And have you, yourself, ever had any difficulties or trouble with Mr. Schriber?

A. Yes, I have.

Q. And can you tell us what that was?

A. Well, one time when we were working tri-levels, I was again, at this time I was unhooking the chains and the hooks, and it was on the bottom deck, and rather than fight **[439]** squeezing between the outside railings and the automobiles and stuff, I was doing it from the ground. With my height and my arms, I could reach in and do it the easier way. And he ran over to Mr. Pinkston and told him that I wasn't working. So Mr. Pinkston come over and proceeded to jump on me because I wasn't working, and I told him I was, and showed him that they were all unhooked. And he says, "Well, to satisfy them, jump up on there and do it the other way."

Q. All right. Now, was it unusual to see Southern Pacific personnel down there?

A. No.

Q. And what was the general response when Southern Pacific personnel came down there?

A. Well, when they come around, you'd move out and look busy.

Q. And why was that?

A. Well, because you could get in trouble.

Q. All right. Did you guys down there ever make any remarks or cracks about that?

A. Yes, we wished they would stay up in their office at Market Street and leave us alone.

Q. Did you ever borrow any money from the Southern Pacific Credit Union?

A. Yes, I did.

[440] Q. Have you ever had occasion to have a free railroad pass?

A. Yes, I have.

The Court: How long have you been a member of the Union?

The Witness: Since 1955.

The Court: Have you always believed that the Credit Unions were owned by the corporations?

Mr. Engel: Your Honor, you mean——?

The Court: Any credit union. Teamsters have a credit union too, don't they?

The Witness: Yes, I think they do. I never looked into it.

The Court: All right.

Mr. Engel: Q. How did you get your free railroad pass?

A. You went to Mr. Hellwig and asked for it.

Q. Okay. And have you seen other Southern Pacific personnel down there that you can remember the names of?

A. It was a Carl Fleischman [phonetic spelling], I don't remember his title, but I remember seeing him down there a lot.

Q. All right, other people?

[441] A. There were several others, but I can't remember their names.

Q. All right. How about any Southern Pacific personnel that inspected the automobiles before they could be loaded?

A. Yes, I have seen them down there, but I don't know their names.

Q. Now, the keys that you talked about with regard to unlocking these automobiles—where were they kept?

A. In a box on the tri-level itself, on the car.

Q. All right. It's part of the tri-level?

A. It's welded to the car.

Q. All right. And this would be the first step in unloading those automobiles?

A. Yes.

Q. And have you had occasion—are you familiar with there being a flag that's attached to the last car in a line of these railroad cars?

A. Right.

Q. Have you ever had occasion to have a Southern Pacific switchman tell you to take the flag off?

A. Yes.

Q. And you have done it?

A. Yes.

Q. Have you ever had occasion to be working on a [442] piggyback car or tri-level car when the engine is attached to the car waiting for you people to finish loading or unloading?

A. Yes, I have.

Mr. Engel: All right, that's all I have, Your Honor.

Cross-Examination

By Mr. Corrigan:

Q. Mr. Kelley, on the occasion that—if you would complain about something and you went to your shop steward, the man you thought about and then you remembered his name, he was a teamster's shop steward, isn't that right?

A. Right, yes.

Q. And you were a member of Local 85, isn't that right?

A. Right.

Q. And so if things got unbearable and people were telling you what to do and, you know, you just weren't going to put up with it any more, you'd go to the teamster's steward, right? I mean, that's the guy you looked to?

A. Yes.

Q. All right. Now, if you were out there and someone was giving you orders that you felt were improper, the fellow you looked to to straighten the situation out in [443] the first instance, the first guy, would have been Pinkston, right?

A. M-hm.

Q. You have to answer up.

A. Yes.

Q. And if Pinkston couldn't straighten it out, then it was Red LaBerge?

A. M-hm, that's right.

Q. And Red LaBerge was the assistant terminal manager, right?

A. Right.

Q. And he was employed by P.M.T., right?

A. That's right.

Q. And if things weren't working out and Red could not straighten it out, and Pinkston couldn't straighten it out, you could then go to George Hellwig right?

A. That's right.

Q. And George Hellwig was the top P.M.T. man out there, right?

A. That's right.

Q. He ran that terminal, right?

A. That's right.

Q. And Pinkston was your boss, right?

A. Right.

Q. All right. Now, your father worked for the [449] Mr. Corrigan: Q. By the way, sir, when you want to work for the railroad or P.M.T., you made an application out to the Pacific Motor Trucking Company, didn't you?

A. Yes.

Q. And it was your understanding that you were applying for employment at Pacific Motor Trucking Company?

A. That's right.

Q. I mean, you knew there was such a company, because your dad had worked for it, right?

A. Right.

[451] Mr. Corrigan: Q. Now, in addition to all the other jobs you had out there, sir, did you drive away automobiles for P.M.T. from time to time?

A. Yes.

Q. And would you drive them to the dealers around town?

A. That's right.

Q. Would you take them off the tri-level and—under what circumstances would you drive an automobile to a dealer, sir?

A. If they were overloaded and didn't have enough carriers and stuff, why, if we didn't have a lot of piggybacks to load or something, sometimes they had us drive automobiles to dealers.

[452] Q. And what did P.M.T. use these tractors for that were out there, Mr. Kelley, in your opinion?

A. Tractors?

Q. Yes.

A. For hauling vans and auto carriers and——

Q. Well, would they use their tractors to haul the vans off of the piggyback flatcars, for example?

A. That's right.

Q. Those would be P.M.T. vans? I mean, P.M.T. tractors, is that right?

A. Yes.

Q. All right. So then, as far as you know, it was P.M.T. tractors that hauled the vans off the piggyback?

A. Right.

[458] "Q. But Local 85 was a Teamsters outfit, is that correct?

"A. Yes.

"Q. You at no time belonged to a railroad union, is that correct?

"A. No."

Mr. Corrigan: Q. So we get that straight, you at no time belonged to a railroad union?

A. No.

Q. Now, I have still got a double negative there.

Mr. Engel: I think he has already answered it.

The Court: You were a member of the Teamsters Union?

The Witness: That's right.

The Court: Not a member of any railroad union?

The Witness: No.

The Court: All right.

[467] "Q. Which one of you fellows would have had the job to put up the safety rails?

"A. Any one of us."

[472] A. Right. Well, we had occasions where if we were sitting or having a break in the afternoon or morning, and here come a bunch of S.P.—Schriber with a bunch of other people, or anybody from the S.P.—why, he would say "Let's go, here come the boys from Market Street."

[476] Q. And what was your job as clerk?

A. Well, I took care of all the railroad freight coming in, the railroad piggyback cars and tri-levels.

Q. What did you take care of? I mean, did you have paper or what did you do?

A. Well, I checked the cars, the railroad cars and piggyback cars, and the vans were on those cars.

Q. What did you check, the waybills, or——

A. No, I checked the cars when the trains came in.

The Court: You checked off the numbers of the cars?

The Witness: Yes, checked the numbers of the cars.

The Court: Checked the seals, too?

The Witness: No, there were no seals on those cars. They were piggyback cars. They call them piggyback cars—two trailers on each car, and I checked the number of the car and the number of the——

The Court: Take the tri-levels. They had a key box, didn't they?

The Witness: Yes.

The Court: Did you check those?

The Witness: No, I didn't.

The Court: To see they were intact?

[477] The Witness: Just checked the number of the tri-level, checked the number of automobiles that were on each tri-level.

The Court: All right.

Mr. Corrigan: Q. When you did that, what did you do with the information?

A. I went out with a rough, oh, switch list and then I typed it out and I made different copies, and I gave some to the P.M.T. and kept some, and sent some to the office, the office at Fourth Street.

Q. All right, now, did you ever climb on the tri-levels and help unload them?

A. No, no, I never did anything like that.

The Court: Ever give anybody any directions with relation to unloading, yourself?

The Witness: No, never did.

The Court: Really, all you did was check the number of the car and the number of the automobiles or vans on each car?

The Witness: Yes, that was my job, yes.

[478] Mr. Corrigan: Q. I know what I wanted to ask you: Were there any other Southern Pacific men who worked in this area where this accident to Kelley happened besides yourself?

A. Well, outside of the switchmen and the car inspectors.

Q. Well, let's not count the switchmen for the moment, but we have heard the name car whacker, and we met Manuel Teijeiro.

A. Teijeiro, yes.

Q. Manuel. And we met Robert Graham. Now, was it Manuel and Robert Graham and yourself—were you the three Southern Pacific men who worked on a day-by-day or day-to-day basis in that area?

[479] A. Yes. Well, I was the day man and then then there was an afternoon and a night man there.

Q. But the afternoon and night men did the same thing as you did?

A. Yes, that's right.

Q. Well, in the day time, let's just hold it to the day time, okay? Besides yourself and Manuel and Robert Graham, were there any other Southern Pacific people that worked around there all the time?

A. No one. Not—I can't—not that I know of.

Q. All right. Now, when did you first know about this accident happening?

A. On the afternoon that the man was hurt.

[480] Q. You have got to speak up. I can't hear you.

A. The afternoon after the man got hurt. No.

Q. Did you see him get hurt?

A. Didn't see him, no.

Q. How did you know he got hurt?

A. Somebody told me a man got hurt on the piggyback.

Q. And you went over there?

A. No, I didn't go over there. I didn't go over there.

Q. You never went over there?

A. No.

Q. How far away from him were you when he got hurt?

A. It would be about a block, I imagine.

[483] A. I became assistant superintendent.

Q. And who was your boss?

A. At that time?

Q. Well, let's get right down to it. Who was your boss when Kelley got hurt?

[484] A. Mr. George Hellwig.

Q. And did a man named Pinkston work under you?

A. Yes, he did.

Q. And was Pinkston in charge of running or seeing that Kelley and the other platform men did their work?

A. Yes, sir, he was the foreman at the piggyback ramp.

Q. And did you have a fellow there named Dutch Hauff?

A. Yes.

Q. And is he a P.M.T. employee?

A. Yes, sir, he was a foreman.

Q. Now, how long had you worked down there around that piggyback operation?

A. From about 1958. I was transferred to Sacramento, I was there three years, and I came back and I was in San Francisco from '58 up until I retired.

The Court: From whom did you take your directions or orders?

The Witness: I took my orders directly from the terminal manager, Mr. George Hellwig.

[489] Q. All right. And have you ever gotten a free railroad pass?

A. Yes, sir, I have.

Q. Do you have a permanent one after ten years of service?

A. Yes, sir, I do.

Q. That was part of your benefits or compensation for staying ten years in the service?

A. The one that I have is . . . Yes, yes.

[493] Q. During the course of your day, did you have. . . . Do you know anybody that works for S.P. that you ever see down in that area where you work?

Mr. Corrigan: I am sorry. You mean at the time of the accident?

Mr. Engel: Yes, say in 1963.

Q. Did you ever run into any S.P. people as you went through your day?

A. Yes.

Q. All right, who did you run into when you went [494] through a normal day? Do you remember the names of any of them?

A. Well, there was the clerk on duty, Mr. Holland.

Q. Okay.

The Court: Mr. Schriber; did you ever see him down there?

The Witness: Oh, occasionally, yes sir.

The Court: Did he ever give you any instructions?

The Witness: No, sir.

Mr. Engel: Q. Anybody else that you would run into?

A. I'd run into perhaps the agent or assistant agent, mostly.

The Court: Did you ever run into Mr. Hedland?

The Witness: Yes, sir.

The Court: Did he ever give you any instructions?

The Witness: No, sir.

The Court: Ever run into Mr. Jarvis?

The Witness: Yes, sir.

The Court: He ever give you any instructions?

The Witness: No, sir.

The Court: Did any of these men whom I have just named—Hedland, Jarvis or Schriber—ever give any instructions to any of the unloaders in your presence?

The Witness: No, sir, not in my presence.

[495] The Court: To your knowledge?

The Witness: No, sir.

The Court: Ever see any of those men ever give any instructions to Mr. Hellwig?

The Witness: Not instructions.

If they had a problem, why, they would discuss it with Mr. Hellwig, yes.

The Court: All right.

[498] The Court: Anyone in Southern Pacific ever give any directions to a truck driver, to your knowledge?

The Witness: No, sir.

The Court: Did you have any supervision over the trucks themselves?

The Witness: Yes, sir, they come under my jurisdiction.

The Court: They came under your jurisdiction?

The Witness: Yes.

The Court: For all purposes?

The Witness: Yes.

The Court: Anyone give any direction to a truck driver other than yourself or Mr. Hellwig?

The Witness: Yes, our foreman could.

The Court: What's his name?

The Witness: Well, we had several of them. Mr. [499] Pinkston, Mr. Hauff.

The Court: All right.

The Witness: These were all Pacific Motor Truck personnel.

The Witness: Yes, sir.

The Court: All right. Could anyone other than Pacific Motor Truck personnel give an order or direction to a driver?

The Witness: No, sir.

The Court: Or give an order or direction with relation to the truck or the use thereof?

The Witness: No, sir.

The Court: Or the repairs of the truck?

The Witness: No, sir.

The Court: All right.

[513] And I submit that what the Smith case is saying is that we have here a non-delegable duty concept, that this railroad had a franchise and a contractual obligation to unload these obligations, and they cannot delegate that responsibility to an independent "independent contractor," and thus say "we are not responsible to those employees."

[515] And just as in this case, the responsibility of unloading those automobiles was the railroad's; and I think the most—for purposes of understanding the position of the plaintiff in this case, we are not saying that all members of Pacific Motor Trucking Company come within the FELA. What we are saying is that a man, such as Mr. Kelley, and each case—all of the cases agree, that each case is to be governed by the facts in that particular case. A man unloading automobiles, when that situation is under the franchise and contractual obligation of the railroad, and under the circumstances of this particular case, given the evidence that is presented to the Courts, this Court, that man does qualify as an "employee." And I specifically mean in quotes, for purposes of FELA.

[516] As to Mr. Kelley, he was specifically performing a non-delegable duty on the part of the railroad, and that was the contractual and franchise responsibility of unloading automobiles.

The Court: All right.

[517] So the cases then line up.

The Court: Didn't they hold——

Mr. Corrigan: What's that, sir?

The Court: —In effect, in substance and effect, the traditional agency standard should apply.

Mr. Corrigan: In the——

The Court: And for the purposes of determining whether he is an employee?

Mr. Corrigan: Yes. And they were wrong, for reasons I am about to discuss with Your Honor.

But, for the first time now in all of these cases, Smith came up with——

The Court: Well, isn't the heart of your case an argument that the term "employee" as used in the Act was intended to apply to the employees of the carrier and that there is no method by which you can conclude on the facts, and let's say of this case, that Eugene C. Kelley was an employee of the railroad?

Mr. Corrigan: Correct.

The Court: Now, aren't you entitled to look to the law of "agency" to determine whether he was an employee of the railroad?

[520] Mr. Corrigan: Well, let me approach the problem this way, Your Honor: In the Smith case, and this is the focal point, I think, to understand it, they say this: That traditional concepts of agency can extend the Act. I think those are the words.

Now, I appreciate the meaning of Section 220 of the Restatement and how a man becomes a servant for another employer besides his general employer. I think the facts in this case support us with regard to the Restatement of Agency and the criteria it sets down. But here is where Smith made **[521]** the mis-

take when they said "the traditional concepts of agency extends the Act." The Act by its own terms provides that an employer in interstate commerce by rail will be responsible to its employees for negligence and—*and* agents of that employer will also be responsible to the employee if injured. Now, that's the concept of agency.

The Court: I know.

Mr. Corrigan: And——

The Court: That calls for a strict interpretation of that language, and I am not persuaded that despite the legislative history, and even as it relates to the so-called statement of the Teamsters Union and everything, that it covers these facts. I certainly would understand it covering after the car is deposited on the dock and the Teamster in the true sense of the word is the guy who picks it up and goes out and delivers it, if that were the facts of this case **[521]** I don't think there would be any doubt in my mind the proper interpretation of the legislative history and the meaning of the Act would bring him outside of FELA. But we are not quite there. We are on the cars, and we are on the railroad cars, and we are removing automobiles, and we are doing a job that's basically the job of the Southern Pacific for which it has responsibility. And I don't think that's a delegable responsibility as far as that goes, the unloading.

[525] The Court: Well, isn't the unloading of automobiles a non-delegable duty of a railroad?

[538] The Court: Now, what about the last question that counsel asks? He says the crucial question is the question of immediate control.

Mr. Engel: All right, Your Honor, if I may.

To begin with, Your Honor, counsel says there are five cases and all of them but Smith have been decided factually in favor of the railroad.

The Court: Well, I am going to assume for a moment there are no cases on either side.

Mr. Engel: Well, there are several cases the other way also.

The Court: His basic argument is that this man is paid by PMT, and they have the immediate control over him and his operations and that he looks to PMT people only. He **[539]** really doesn't look to the railroad people, and so they say here immediate control is that of PMT, and that this is the primary factor that you have to look to. All right. This factor is absent, where does the relationship of Kelley to the railroad exist in sufficient form or substance as to make him an employee?

[545] This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3rd, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact, and **[546]** in such relationship to the Southern Pacific Company as to be covered by FELA.

Now, that's the substance of my holding. Now, gentlemen, I recognize that the problem is a difficult one. And while this is my considered judgment as to an appropriate finding to be made on these facts, I cannot say that the position taken by the defendants here is without merit.

[559] *Thursday, April 16, 1970*

The Clerk: Civil Case No. 45344, Kelley vs. Southern Pacific Company, further trial.

The Court: All right, gentlemen.

Mr. Engel: Your Honor, this morning I filed the—as long as I had to go ahead and prepare an argument——

The Court: I have read your memo, and I would like to ask you gentlemen a question at the very outset here.

This matter is before me at the present time for a limited purpose, I am correct in that, without saying what it is, for the moment.

Mr. Engel: Yes, Your Honor.

The Court: Did you have a request for a jury trial here?

Mr. Engel: Yes, Your Honor.

The Court: So that presumably if a ruling were in favor of the plaintiffs eventually you would have a jury trial. If it's against the plaintiff, that presumably will end the case.

Mr. Engel: Correct, Your Honor.

The Court: All right: Now, in determining the relationship of Mr. Eugene C. Kelley to the Southern Pacific Company, are you gentlemen in agreement as to whether this is or is not a question for decision by the Court, or are there **[560]** circumstances under which this may become a question for decision by the jury?

Mr. Corrigan: Well, I believe the pretrial order provides, and we have so agreed in our pretrial statements, that this is a decision for the Court.

The Court: So that to the degree that any facts are involved in rendering that decision, I become the trier of the facts for that purpose?

Mr. Corrigan: Yes, sir.

Mr. Engel: Correct, Your Honor.

The Court: All right.

Mr. Engel: In other words, it was my understanding——

The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the Baker case, for instance, the Supreme Court found it to be a question in a sense for the jury.

Mr. Engel: Well, Your Honor, what we did here is that we bifurcated the trial in fact, and we asked for—there were two factual problems, the one being presented to the Court now, and the other one would be negligence and damages in a subsequent trial.

For this factual question it was agreed that you would be the trier of fact.

[561] The Court: As long as I understand that there is no possible misunderstanding.

Mr. Engel: And the legal part had already been resolved, Your Honor, by the motion for summary judgment. In other words, we had the argument as to whether it was a legal defense.

The Court: Well, but you see, a motion for summary judgment carries with it the question of whether there is a conflict in the facts. And the motion for

summary judgment, which is a three-line order, or a four-line order, does not tell us anything on that score.

Mr. Engel: Right.

The Court: It could be that the judge denied the motion for summary judgment because he said I can't pass on it because there is a conflict in facts which has to be resolved.

Mr. Engel: Well, that was by understanding of the order, Your Honor. In other words, there was a factual question presented.

The Court: So he made no ultimate ruling on the law in the denial of summary judgment. He merely said, because there is a conflict on the facts, I must deny summary judgment.

If he made a ruling on the law I would have some difficulty understanding why you are here at all in the sense of having a bifurcated trial of an issue. All right.

[598] The Court: All right.

While an understanding of the full scope of the language of the statute, and, in particular, the terms "while he is employed by such carrier" presents serious difficulty, the Court finds some aid and a guide in the language of the Supreme Court in the Baker case wherein the Court said: "It has been well said of the question . . ." and the question they are referring to is the question of the use of the terms "employ" and "employed" in the Act.

Now, to repeat: "It has been well said of the question that each case must be decided on its peculiar

facts. And, ordinarily, no one feature of the relationship is determinative.

This language when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity' aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles."

This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3rd, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact, and **[599]** in such relationship to the Southern Pacific Company as to be covered by FELA.

Now, that's the substance of my holding. Now, gentlemen, I recognize that the problem is a difficult one. And while this is my considered judgment as to an appropriate finding to be made on these facts, I cannot say that the position taken by the defendants here is without merit.

RESTATEMENT, AGENCY 2d
WHO IS A SERVANT

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

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In the United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Plaintiff and Appellee,
vs.
Southern Pacific Company,
a corporation,
Defendant and Appellant.

[Filed October 13, 1971]

MOTION FOR CORRECTION AND MODIFICATION OF RECORD

Pursuant to Rule 10, Federal Rules of Appellate Procedure, defendant and appellant moves the court

to correct and modify the record by adding thereto the "Findings of Fact and Conclusions of Law", marked Exhibit A, attached and made a part hereof. The ground for the motion is that this paper was regularly submitted by plaintiff and appellee to the court below and formed part of its consideration, that it was omitted from the record by error or accident, and that the paper is material to the appeal of defendant and appellant, all as is more particularly shown by the affidavit of Donald Roy attached hereto and submitted in support of this motion.

Dated, October 13, 1971

/s/ Donald O. Roy
Donald O. Roy,
Attorney for Defendant and Appellant
Southern Pacific Company
One Market Street, Room 834
San Francisco, Calif. 94105

October 14, 1971, So ordered R. W. Chambers Judge.

Donald O. Roy
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Attorneys for Defendant and Appellant
Southern Pacific Company

In the United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Plaintiff and Appellee,
vs.
Southern Pacific Company,
a corporation,
Defendant and Appellant.

AFFIDAVIT IN SUPPORT OF MOTION FOR CORRECTION AND MODIFICATION OF RECORD.

State of California
City and County of San Francisco ss.

Donald O. Roy, being duly sworn, declares and says:

The document attached hereto marked Exhibit A and entitled "Findings of Fact and Conclusions of

Law" was received in the mail at the end of May or beginning of June, 1970. The document is actually requested or proposed findings and conclusions, and was prepared and submitted by R. Jay Engle, Esquire, attorney for plaintiff and appellee. In response thereto we submitted to the court a document entitled "Objections to Plaintiff's Proposed Findings of Fact . . ." etc. This document became part of the record (Clerk's Record p. 328) and is noted in the Clerk's docket entires on June 5, 1970, item #83 (Clerk's Record p. 393).

Following submission of the above documents a hearing was held in chambers of The Honorable Alfonso J. Zirpoli, the trial court judge. I personally attended this hearing. Judge Zirpoli had in his possession and referred to and used the requested findings submitted by plaintiff. Through error or accident the plaintiff's proposed findings did not become part of the record on appeal, and in fact no filing entry for the document is noted in the Clerk's docket entries. The plaintiff's proposed findings are material to defendant's appeal in that the court used some, modified some and rejected others and this will or may explain, and clarify, if necessary the court's actual findings and conclusions as adopted and filed on June 29, 1970 (Clerk's record p. 335). Plaintiff's proposed findings are essential to a proper understanding of the issues and the court's actions, and are material and essential to defendant's appeal. I therefore request that, pursuant to Rule 10, Federal Rules of Appellate Procedure, this court correct and modify the record by

adding thereto the "Findings of Fact and Conclusions of Law" requested by plaintiff, marked Exhibit A and attached hereto.

Dated: October 13, 1971

/s/ Donald O. Roy
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In the United States District Court
For the Northern District of California

No. 45,344

Eugene C. Kelley, Plaintiff,
vs.
Southern Pacific Company, a corporation, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Eugene C. Kelley, requests the following findings of fact and conclusions of law be made:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley was injured July 3, 1963 at the multi-level railroad car loading and unloading ramp of defendant Southern Pacific Company at 4th and Channel Streets, San Francisco. At such time and place, plaintiff, Eugene C. Kelley, along with three other persons, was assisting in the unloading of

automobiles from the top level from the tri-level railroad car.

II. Defendant, Southern Pacific Company, by and through agreement with Pacific Motor Trucking Company had the right to exercise control over the details of the work being performed by the plaintiff, Eugene C. Kelley at the time of the accident in question.

III. The work being performed by plaintiff Eugene C. Kelley at the time of the accident in question was not distinct from the business that defendant Southern Pacific Company was authorized to do and was doing at the site where the accident in question occurred.

IV. The work being performed by the plaintiff, Eugene C. Kelley at the time of the accident in question was not such that required skill.

V. Defendant, Southern Pacific Company, supplied the instrumentalities, tools, and the area in order to perform the work being done by the plaintiff at the time of the injury in question.

VI. The plaintiff, Eugene C. Kelley had been employed at this particular job and location for a period of eight years and there was no time limitation upon which this employment of Eugene C. Kelley would terminate.

VII. The plaintiff, Eugene C. Kelley was paid by the hour and not on the basis of work or job completed.

VIII. The work being performed by the plaintiff Eugene C. Kelley was part of the regular business of defendant Southern Pacific Company.

IX. Defendant Southern Pacific Company and the plaintiff Eugene C. Kelley believed that a relationship of master and servant existed between the plaintiff Eugene C. Kelley and defendant Southern Pacific Company.

X. Defendant Southern Pacific Company was authorized to do and was in fact doing the business of unloading automobiles at the site of the accident in question from the top level of the tri-level railroad car from which the plaintiff Eugene C. Kelley fell on July 3, 1963.

XI. All of the real properties surrounding the area where the accident occurred was owned and controlled by defendant Southern Pacific Company.

XII. During the eight years that plaintiff Eugene C. Kelley was so employed he worked regular hours as a full-time employee at the specific area where the accident in question occurred.

CONCLUSIONS OF LAW

I. The plaintiff, Eugene C. Kelley, was an "employee" of defendant Southern Pacific Company as set forth in *Baker v. Texas and Pacific Railroad* (1959) 359 U.S. 227 and *Ward v. Atlantic Coast Line* (1960) 362 U.S. 396.

II. This Court has jurisdiction under the Federal Employers Liability Act, 45 U.S.C. §51 et seq.

Dated: .....

Honorable Alfonso J. Zirpoli